93-631

No.____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE PHILADELPHIA ELECTRIC COMPANY, et al.,
Petitioners

v.

HERBERT L. FISCHER, et al.

THE PHILADELPHIA ELECTRIC COMPANY, et al.,
Petitioners

v.

DONALD R. KURZ, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the fiduciary responsibility provisions of the Employee Retirement Income Security Act apply to an employer's communications with its employees regarding a possible business decision to change a benefit plan?

PARTIES TO THE PROCEEDINGS

Herbert L. Fischer, et al. v. PECo, et al.

The **Petitioners** are Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie, and Service Annuity Plan of Philadelphia Electric Company.

The **Respondents** are Herbert L. Fischer, Floyd L. Adams, James W. Alfreds, John I. Arena, Earl T. Atkinson, William Auve, Thomas F. Beck, William J. Bono, William A. Burwell, Jr., Joseph C. Calabrese, Peter Carfagno, John B. Creighton, Ralph J. DaFermo, Sr., Felix A. DeJoseph, Joseph A. DeVito, John T. Dougherty, John J. Dowling, Anthony Falasca, Eugene Fink, Rita J. Gesualdo, Joseph L. Giorgio, Edwin Haines, Joseph T. Haley, Daniel J. Hefferan, Leo M. Hill, Robert J. Hoopes, Donald J. Hoy, Michael Hrynko, Donald Hughes, Carl M. Hunsicker, Neal Ireland, Walter D. Kraus, Charles E. Lindemuth, Robert F. Mahoney, Anthony D. Marchesani, Robert P.F. McCarron, Robert McCormick, Frank L. Mercadante, John P. Monaghan, David Monzo, John K. Moore, Joseph P. Moran, Mildred Pearl Morgan, Ralph E. Moyer, Herbert E. Mueller, James J. Nugent, Thomas E. Oetzel, Frank W. Persichetti, Sr., Charles W. Plummer, Lewis Raibley, James J. Roddy, John J. Saunders, Louis F. Saunders, Nicholas J. Screnci, Joseph J. Semetti, John Steindl, William F. Thompson, Michael W. Trendler, Francis R. Tunney, Sr., Herbert R. Walters, Richard S. Wilson, John H. Zimmer and Gerald A. Zimmerman.

PARTIES TO THE PROCEEDINGS (Cont'd)

Donald R. Kurz, et al. v. PECo, et al.

The **Petitioners** are Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr.

The **Respondents** are Donald R. Kurz, William W. Anderson, James W. Beck, William T. Bergen, Charles W. Bowden, William H. Brown, Richard Cahill, Armando L. Capoferri, Robert C. Demarco, James J. Dilolle, Sr., Vincent J. Dimaggio, John J. Divalentino, Jr., William E. Drumel, Victor J. Gibialante, Francis T. Golden, James J. Granger, Elmer D. Greim, Jr., James H. Hair, John M. Hoopes, Benjamin J. Kilian, George C. Linthicum, Hubert A. McKown, Jr., Henry P. McNamee, Oliver K. Messner, Robert E. Miller, John A. Morse, Samuel J. Mullen, John A. Munley, Stanley B. Myers, John J. Nusspickel; James W. Patterson, Alfred B. Schumann, Joseph C. Sharkey, William H. Smoyer, Woodrow E. Snyder, James D. Sutliff, Edward J. Vetner, Dominic C. Viglianese, G. Earle Watt, Frederick W. Winterling, John R. Young.

RULE 29.1 STATEMENT

There are no affiliates or subsidiaries of Philadelphia Electric Company other than wholly-owned subsidiaries.

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IN THE SUPREME COURT OF THE UNITED STATES

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THE PHILADELPHIA ELECTRIC COMPANY, et al.,
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THE PHILADELPHIA ELECTRIC COMPANY, et al.,
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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Philadelphia Electric Company ("PECo"), Joseph F. Paquette, Jr., Michael J. Crommie, Charles L. Fritz, J. L. Everett, III, John H. Austin, Jr., and the Service Annuity Plan of Philadelphia Electric Company, through their undersigned counsel, petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinions of the court of appeals are reported at 994 F.2d 130 (Appendix at A-1 to A-12) and 994 F.2d 136 (A-13 to A-20). The opinion of the district court (A-21 to A-61) is not reported.

STATEMENT OF JURISDICTION

The judgments of the court of appeals were entered on May 26, 1993. Timely petitions for rehearing were denied on July 20, 1993. (A-62 to A-65). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are 29 U.S.C. §§ 1001(a); 1002(16)(A)(ii); 1002(21)(A)(iii); 1021-25; 1054(h); 1104(a)(1); 1108(c)(3); and 1341. They are reproduced in the appendix. (A-66 to A-102).

STATEMENT OF THE CASE

This petition involves two separate claims that PECo violated a fiduciary duty owed to former employees who participated in the company's pension plan prior to their retirement. In each case, the retirees allege that PECo misled them about its "serious consideration" of possible amendments to the pension plan which would have increased their retirement benefits. In *Fischer*, the amendment at issue created an early retirement incentive opportunity for certain eligible participants, while in *Kurz* the amendment increased the level of retirement benefits for certain participants. The specific issue presented in this petition is whether the fiduciary requirements of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, are applicable to an employer's communication, or lack of communication, of matters which are concededly business in nature and which do not involve the administration of the plan.

The parties in each case have agreed that the facts are *not* disputed. Joint Stipulations of Fact were filed with the district court, upon which facts the parties based their cross-motions for

summary judgment. The district court granted Petitioners' motion in each case.

A. Factual Background

PECo maintains a retirement plan, the Service Annuity Plan, which is an employee pension plan as defined in ERISA. 29 U.S.C. § 1002(2)(A). PECo is the plan sponsor and plan administrator.

1. The *Fischer* Case

The respondents in *Fischer* are former employees of PECo who retired between January 1, 1990 and April 1, 1990, and who claim that PECo misrepresented to them its intentions regarding a future early retirement incentive program. That program, which was announced on April 19, 1990, was implemented in response to a perceived need to reduce PECo's business costs.

First, as part of its overall corporate strategy, PECo has periodically conducted manpower studies and compared its staffing levels with those of other electric utilities. In November, 1989, PECo retained an outside consultant to assist in developing a long range plan for achieving a cost reduction in the range of $110 million to $220 million. Among other things, the consultant concluded that PECo had too many employees in certain areas. On April 4, 1990, it presented a progress report to PECo's Board of Directors which included an early retirement opportunity for all staff employees as one of several possible means of reducing personnel costs.

Second, in July, 1989, PECo submitted a request for a $549 million rate increase to the Pennsylvania Public Utility Commission ("PUC"). In December, 1989, PECo's chief executive officer, Joseph Paquette, addressed that rate increase request, and its possible effect on employment, in his "state of the company" speeches to employees. He stated that if the company were required to reduce the workforce its priority would be to do so by attrition, and possibly by an early retirement program. On March 1, 1990, PECo received an interim decision from an administrative law judge which recommended that only 21% of the requested increase be granted.

On April 7, 1990, Mr. Paquette requested that there be no discussion with employees at that time regarding the consultant's recommendations because the PECo Board of Directors

had not yet acted on them and he did not want to cause undue employee speculation. However, on April 19, 1990, PECo received the PUC's final decision, in which it granted less than 50% of PECo's requested rate increase. On that same day, Mr. Paquette wrote to all employees, including those who had announced a decision to retire, a letter which stated, *inter alia*, that he was going to recommend that the Board approve an early retirement program. The Board approved such a plan on May 25, 1990.

During 1990, various rumors existed among PECo's employees about a possible early retirement program. Jack McCartney was a benefits counselor for PECo during that time, whose responsibilities included answering questions posed by employees about retirement options. In response to questions posed by employees before April 19, 1990 regarding those rumors, Mr. McCartney truthfully stated: "I have no idea. I heard the same rumors from other people. There is nothing official announced and as far as I know there is nothing I can tell you." The rest of the Benefits Division staff answered similar questions during that period by truthfully stating that they had no knowledge of any plan that was being implemented.

2. The *Kurz* Case

The respondents in *Kurz* are former employees of PECo who voluntarily retired between February 1, 1987 and June 1, 1987, and who claim that PECo misrepresented its intentions regarding an improvement in the benefit formula which was announced on June 22, 1987.

Over a period of years prior to 1987, there was a growing interest within PECo in improving the benefit formula under the pension plan. Beginning in at least 1985, various studies were performed and information gathered regarding PECO's pension obligations, its level of pension benefits as compared to other companies, and the costs of benefit improvements. Discussions about possible improvements also took place from time to time with representatives of the Independent Group Association ("IGA"), an organization of PECo employees who wished to join and who were not supervisors.

Wage and benefit increases within PECo historically took place in August. In August, 1986, the IGA submitted to PECo a specific proposal for an increase in the pension benefit.

In February, 1987, PECo's Personnel and Industrial Relations department began working with the company's outside actuaries with respect to a possible pension plan change. Various alternative changes were evaluated both by PECo's outside actuaries and inside the company between February and May, 1987. On March 5, 1987, various proposals were discussed with IGA representatives, who were told that PECo had been looking at certain alternatives, including the IGA's 1986 proposal, and that the timing was right for a change. A new proposal for an increase in pension benefits was submitted by the IGA on April 15, 1987.

On May 28, 1987, approval was given by PECo's chief executive officer to seek Board approval of a specific proposal. On June 22, 1987, the Board approved the proposal, which was announced to employees immediately thereafter. Until that time the proposal to amend the pension plan was not discussed with employees generally. As a matter of policy PECo considered it bad management to do so because proposed changes might be modified or not adopted at all.

B. The Proceedings Below

Complaints were filed in the district court[1] in *Fischer* and *Kurz* in which the plaintiffs alleged that they would have delayed retirement beyond the date of the applicable plan amendment had they not been misled by PECo regarding the status of its consideration of a possible amendment to the pension plan. They conceded that they received all of the benefits to which they were entitled under the terms of the plan at the time they retired, but they sought the additional benefits later made available by the applicable plan amendment under, *inter alia*, a breach of fiduciary duty theory.

In the district court the parties agreed that the material facts were undisputed, and they filed cross-motions for summary judgment on a stipulated record. In considering those motions,

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1. The district court's jurisdiction was based on 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331.

the district court first affirmed the legal principles that PECo's decisions to amend the plan were not fiduciary decisions, and that nothing in ERISA requires an employer to disclose information on benefit plan changes before they take effect. The court further concluded that PECo had no duty to advise its employees regarding the *Fischer* amendment before April 19, 1990, the day the decision was made, and regarding the *Kurz* amendment before June 22, 1990, the day the Board approved it, subject only to a duty not to make material misrepresentations regarding its intent prior to those dates. The court concluded that no material misrepresentations were made and that PECo's benefits counselors truthfully answered participants' questions. After rejecting various other theories of recovery advanced by respondents, the district court entered judgment in favor of PECo.

The Third Circuit reversed and remanded. It first acknowledged that PECo's actions in amending the plan were business activities not subject to ERISA's fiduciary obligations. Relying on *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), however, the court noted that PECo nevertheless as plan administrator possessed certain fiduciary obligations to plan participants regarding the *communication* of business deliberations and the possible plan amendments. Although the court did not refer to any provision of ERISA recognizing this distinction, it held that PECo did not have an *affirmative* duty to disclose its business deliberations, but that it did have a fiduciary duty to answer truthfully questions presented by plan participants if the information involved was material to a participant's retirement decision, and if the company's plans had proceeded to the "serious consideration" stage. Acknowledging that PECo's benefits counselors truthfully answered participants' questions, the court nonetheless held that PECo could not avoid its "fiduciary" duty by building what the court described as a "Chinese wall" around the benefits counselors by withholding from them information about the status of the company's business deliberations. Because the court believed, despite the parties' stipulation to the contrary, that there were genuine issues of fact regarding the materiality of the information withheld and when

PECo first gave "serious consideration" to the amendments, the matter was remanded to the district court.

A timely petition for rehearing *en banc* was filed and denied, with Judges Stapleton, Hutchinson and Roth voting in favor of rehearing. Judge Stapleton authored the court's opinion in *Payonk v. HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989), which was relied upon extensively by the district court in its decision in favor of PECo.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Because the decisions to amend the pension plans, and the communication or lack of communication to employees about those decisions, were part of PECo's business activities and were unrelated to the administration of the pension plan, the fiduciary duties created by ERISA did not apply to them. The decisions of the Third Circuit should be reviewed because they expand those fiduciary duties beyond the intent of Congress in ERISA, because they will unreasonably interfere with the administration of that statute, and because they conflict with decisions of this Court and other circuit courts of appeals.

Hundreds of thousands of employers are faced every day with the task of administering ERISA governed benefit plans which cover millions of workers and encompass hundreds of billions of dollars in assets. The decisions of the Third Circuit will make the administration of the plans and the enforcement of ERISA, "an enormously complex and detailed statute," a practical impossibility for employers and the courts. Contrary to this Court's admonition that the text of ERISA cannot be disregarded for the sake of expediency, the Third Circuit has arbitrarily imposed on employers a "fiduciary" obligation to disclose to some, but not all, plan participants business information that might be "material" to a participant's retirement decision. In so doing, the Third Circuit has effectively negated the express authorization Congress has given for an employer to act simultaneously as plan sponsor and plan administrator, and it has imposed fiduciary and disclosure obligations and liabilities on employers beyond those Congress saw fit to impose. As a

result, the certainty and uniformity in the disclosure of information which Congress expressly mandated in ERISA will be replaced by a guessing game for employers as to what must be disclosed, and when, and to whom.

The decisions are also irreconcilable with a long line of circuit court decisions recognizing the distinction between plan sponsor activities, which include the adoption, amendment or termination of a plan, and plan fiduciary activities. Although the Third Circuit acknowledges this distinction, these decisions have effectively destroyed it by imposing on an employer a fiduciary obligation to disclose its confidential business activities and plans. The Third Circuit has thus created a new cause of action under ERISA which Congress never contemplated or authorized, in direct contradiction of this Court's decision in *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063 (1993).

I. The Court Of Appeals' Decisions Impermissibly Expand The Scope Of An Employer's Fiduciary And Disclosure Obligations Under ERISA And Raise Important Issues Of Statutory Interpretation And Administration.

The Third Circuit has held in these two cases that a fiduciary duty may attach to an employer's communications to plan participants about contemplated business decisions if the information conveyed would have a material effect on a participant's retirement decision. These holdings are plainly inconsistent with the provisions of ERISA. An employer is expressly authorized to act both as a plan sponsor and plan administrator. It functions as a plan sponsor in such decisions as establishing, amending or terminating a plan. A plan administrator's duties include such things as preparing and distributing a summary plan description, calculating benefits, and assuring that benefits are paid in the proper amount and form. ERISA limits the scope of fiduciary conduct to activities relating to the *administration* of the plan, a limitation ignored by the Third Circuit. The decisions therefore raise important issues relating to the scope and administration of ERISA.

A. The Relevant Provisions Of ERISA.

Section 408(c)(3) of ERISA specifically authorizes an employer to act simultaneously as a plan sponsor and plan administrator. 29 U.S.C. § 1108(c)(3). Indeed, a plan sponsor assumes the role of plan administrator by default if no plan administrator is identified in the plan. 29 U.S.C. § 1002(16)(A)(ii). The federal courts have therefore consistently recognized that an employer may act from time to time in either capacity, and that many employer decisions regarding benefit plans must be treated as business, and not fiduciary, decisions. The courts have defined such business decisions to include the adoption, amendment, or termination of a benefit plan. *See, e.g.*, *Fletcher v. Kroger Co.*, 942 F.2d 1137 (7th Cir. 1991) (plan establishment); *Belade v. ITT Corp.*, 909 F.2d 736 (2d Cir. 1990) (plan establishment); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990) (plan amendment); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221 (3d Cir. 1989) (plan termination); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985) (plan amendment), *cert. dismissed*, 474 U.S. 1113 (1986).

Congress also carefully defined in ERISA the circumstances under which an employer will assume obligations as a plan administrator that are fiduciary in nature. Specifically, in Sections 101 through 105 of ERISA, 29 U.S.C. §§ 1021-1025, certain mandatory disclosure obligations are imposed on a plan administrator.[2] Additional potential obligations imposed on an employer flow from the definition of a "fiduciary" set forth in ERISA, which in relevant part states that "a person is a fiduciary with respect to a plan to the extent . . . he has any discretionary authority or discretionary responsibility *in the administration of such plan*." 29 U.S.C. § 1002(21)(A)(iii) (emphasis added). *If* an employer possesses that discretionary authority or responsibility with respect to the administration of a plan, the employer must "discharge his duties *with respect to a plan* solely in the interest

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2. These disclosure obligations include, *inter alia*, the preparation and dissemination of a summary plan description and the providing to plan participants of an annual statement of benefits under a pension plan. The mandatory contents of a summary plan description are established in Section 102 of ERISA, 29 U.S.C. § 1022.

of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1) (emphasis added).

Thus, the scheme envisioned by Congress when an employer adopts a plan and acts as plan administrator, by choice or by default, is straightforward and easily discernible. The employer acting in a business capacity need not offer or continue a plan, and in deciding whether to do so is answerable only to its shareholders. *See Payonk v. HMW Indus., Inc.*, *supra*, 883 F.2d at 229. If a plan is offered, the employer *must* comply with the reporting and disclosure requirements of ERISA. The employer acts as a fiduciary *only* when and if the employer undertakes a discretionary responsibility or authority *in the administration of the plan*; it is not a fiduciary with respect to anything and everything that the employer may do in its business *in connection with* the plan.[3]

B. The Third Circuit's Decisions Impermissibly Expand The Scope Of An Employer's Fiduciary And Disclosure Obligations.

The Third Circuit's decisions plainly conflict with this express statutory scheme. First, the Third Circuit held that an employer acts as a fiduciary when it communicates with employees *regarding a matter unrelated to the administration of the plan*. Specifically, the Third Circuit conceded, as it must, that each decision by PECo to amend the pension plan was a business, and not a fiduciary, decision, and that no affirmative duty to disclose that decision prospectively was created by ERISA. The court nonetheless held that PECo acted as a fiduciary when employees inquired about that business decision and PECo's business intent, even though such communications were entirely unrelated to the administration of the plan. *Cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) ("The

3. PECo recognizes that the federal courts must also consider certain common law trust principles in defining the scope of a fiduciary's powers and duties under ERISA. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570-71 (1985). Other than those principles relating to the avoidance of a conflict of interest, however, which are not implicated in this case, there is no common law duty requiring a trustee to disclose to a beneficiary information about the trustee's business or business decisions. *Cf. Restatement (Second) of Trusts* § 173 (1959).

focus of [ERISA] thus is on the administrative integrity of benefit plans – which presumes that some type of administrative activity is taking place."). The extension of a fiduciary duty to communications about a business decision is therefore inconsistent with both the express language of ERISA and congressional intent.

The Third Circuit's confusion is reflected in its statement that "[a]s a plan administrator under ERISA, however, PECo was a fiduciary and was required, among other things, 'to discharge [its] duties "solely in the interests of the participants and beneficiaries." ' " *Fischer*, *supra*, 994 F.2d at 133 (citation omitted). The Third Circuit unfortunately failed to mention in the above passage that the actual *language* of § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), states that a fiduciary must act solely in the interest of participants and beneficiaries *only* in his "duties with respect to the plan." This editing of the language of Section 404 to remove a critical limitation on the scope of a fiduciary's duties is emblematic of the Third Circuit's disregard of the limitations imposed by Congress on the scope of fiduciary obligations under ERISA.

The Third Circuit qualified its holdings by suggesting that an employer has no *affirmative* duty to disclose its business plans, but only a duty to be truthful in responding to a participant's inquiry. This qualification, however, makes little practical or legal sense, and highlights both the administrative nightmare the decisions will create and the internal inconsistency in the decisions themselves. A fiduciary duty applies to the activities of an entity as a fiduciary. If the employer is a fiduciary when it decides whether and what information to disclose to employees, as the Third Circuit concluded, it *must* act in the sole interest of the participants in doing so. The employer cannot allow interests of persons other than the participants to influence its conduct, and it therefore cannot fail to disclose information to a participant, who doesn't ask or who asks the wrong question, because of concerns about corporate interests. In short, if one accepts the Third Circuit's premise that an employer acts as a fiduciary in communicating, or deciding *not* to communicate, with plan participants about future business decisions, then one must also accept that the

employer is required to act in doing so solely with the interest of plan participants in mind. Under that standard of conduct, whether the participant asked the right question would be immaterial to the employer's obligation to disclose.

Second, the decisions of the Third Circuit effectively remove the distinction between plan sponsor and plan administrator functions expressly authorized by ERISA, because an employer's failure to disclose the status of its confidential business intentions unrelated to plan administration may violate a fiduciary duty.[4] Such a result creates an unacceptable tension between the fiduciary duties to participants created by ERISA and the ongoing fiduciary duty owed by corporate management to the company's shareholders. For example, the type of employer conduct at issue in the *Fischer* case, the offering of a window plan, is intended to benefit the corporation, its employees and its shareholders by facilitating a voluntary reduction in the workforce and the company's costs. In furtherance of its fiduciary obligations to shareholders, corporate management may wish to delay disclosure of the window for legitimate corporate reasons such as union bargaining, planning for new work assignments, or securities disclosure planning. An employer in that situation would be faced with an impossible conflict of loyalties and obligations because of the Third Circuit's decision, despite the fact that the decision to offer the window plan is entirely unrelated to ongoing plan administration, and therefore is not governed by ERISA's fiduciary principles. An unfortunate result of that conflict could well be a decision by the

4. A possible solution to the dilemma for employers posed by the Third Circuit is to retain a third party to act as plan administrator. The practical effect of the decisions, therefore, is that participants in plans in which the employer acts as plan administrator would be entitled to greater disclosure than would participants in plans in which the employer retains a third party administrator. In *Payonk v. HMW Industries, Inc.*, *supra*, 883 F.2d at 229, the court stated that it saw "no reason" for such an absurd result in light of ERISA's express authorization of the "two hat" concept. Moreover, most, if not all, large employers self-administer their pension plans. The "solution" would in fact require a broad restructuring of the way pension administration is currently conducted, with no benefit to participants, and an obvious increase in administrative costs.

employer to terminate employees *involuntarily*, an outcome that hardly benefits plan participants.

Third, the decisions of the Third Circuit conflict with the carefully crafted disclosure requirements of ERISA. In Sections 101 through 105 of ERISA, 29 U.S.C. §§ 1021-1025, Congress specified in detail the information which a plan administrator "shall" furnish to plan participants and beneficiaries. These provisions of ERISA reflect the intent of Congress that employers be aware of and subject to uniform *written* disclosure requirements, and that all plan participants receive the same general information regarding the administration of the plan. The decisions of the Third Circuit confuse and expand the disclosure obligations Congress imposed upon an employer by creating a duty to publish business decisions and information which depend upon such ill-defined concepts as "serious consideration" and whether a plan participant poses the correct question.

That result is inconsistent with the emphasis in ERISA on precision in defining the plan administrator's disclosure obligations, and the requirement in Section 102(a)(1) that disclosure be "written in a manner calculated to be understood by the *average* plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations *under the plan*." 29 U.S.C. § 1022(a)(1) (emphasis added). Applicable regulations already require that a summary plan description "must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. § 2520.102-2(b) (1992). This Court has recognized that "[u]nder ERISA, fiduciaries are assigned a number of detailed duties and responsibilities, which include the disclosure of *specified information*." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (emphasis added). These disclosure requirements were carefully considered and, like the rest of the statute, represent a balancing by Congress of competing interests. The legislative history reflects an intentional focus on *specificity* in the rules on disclosure to plan participants, and includes the statement that "if pensions are to be equitable and honest the rules on disclosures of all information relating to pension funds must be

very strict and explicit." 120 Cong. Rec. H8698 (daily ed. Aug. 20, 1974) (statement of Congressman Biaggi), *reprinted in* 3 Legislative History Of The Employee Retirement Income Security Act of 1974, at 4661. Indeed, Congress concluded that the interests of participants would be furthered by including in ERISA a detailed description of the disclosure expected of fiduciaries:

> Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan. . . . At the same time, the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that . . . individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

Material Explaining H.R. 12906 Together With Supplemental Views (To Accompany H.R. 2), *reprinted in* 2 Legislative History Of The Employee Retirement Income Security Act of 1974, at 3307.

This Congressional intent has been implemented in the explicit requirements of ERISA covering mandatory communications to participants, including summary plan descriptions and descriptions of material modifications to existing plans. As directed by Congress, the Department of Labor has promulgated comprehensive regulations concerning the content and timing of disclosure. 29 C.F.R. § 2520 (1992). It is thus clear that Congress chose to create a specific – and mandatory – system of disclosure to plan participants under ERISA.[5]

Thus, the practical result of the Third Circuit's decisions will be the absence of any rules of consistent application

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5. Indeed, Congress itself was capable in ERISA of stating, when it chose to do so, precisely what information about employer plans *must* be disclosed, and when. *See, e.g.*, 29 U.S.C. 1341 (a plan administrator must give "each affected party" at least 60 days notice of a proposed termination of a single employer pension plan); 29 U.S.C. § 1054(h) (a plan administrator must give participants, *after* the adoption of a plan amendment reducing future benefit accruals, at least 15 days notice before its effective date).

regarding the disclosure of information to plan participants. This result directly and unacceptably contradicts the policy of ERISA that disclosure to plan participants be uniform and in writing, and unacceptably interferes with an employer's ability to comply with ERISA and the administration of that statute.

C. The Third Circuit's Decisions Will Interfere With The Administration Of ERISA General Benefit Plans.

Since ERISA was enacted, employers have administered ERISA plans with virtually complete certainty that if they complied with the applicable statutory provisions and regulations, they would be meeting their disclosure obligations under ERISA, and participants would be receiving the information Congress intended them to receive. This day-to-day administration of benefit plans in the United States, as found by Congress, has been enormous in scope and importance to employers and plan participants alike. *See* 29 U.S.C. § 1001(a). For all employers, both large and small, that certainty in the administration of ERISA plans has now been diminished, as is evident from consideration of just a few of the practical problems created by the Third Circuit's decisions.

For example, the scope of the *business* information which employers might have to disclose to plan participants is now virtually unlimited because it could include any matter which is "material" to an employee's decision regarding retirement. Materiality is defined as whether "there is a substantial likelihood that [the information] would mislead a reasonable employee in making an adequately informed decision about if and when to retire." *Fischer*, *supra*, 994 F.2d at 135. That decision, however, could be influenced by an enormous range of possible employer business activities, such as a contemplated wage increase, the decision to terminate or amend a pension plan, the decision to terminate or enhance retiree medical benefits, the sale or purchase of a business, the decision to increase wages or benefits for employees, or the offering of a stock incentive plan.

It takes little imagination to expand further the scope of the potential areas of disclosure. An employee who is a participant in a plan, such as a 401(k) plan, that includes employer stock as an asset, may be concerned about future increases in the stock price as part of his retirement deliberations. Under the Third

Circuit's decisions, an employer may be required to disclose to that employee any business decisions which might affect the price of the stock and which are under "serious consideration." The matters which the employer could be obligated to disclose may include topics on which the employer is bargaining with a labor union, or which are being discussed with financial lenders, and as to which the employer has a compelling interest in maintaining confidentially. Nonetheless, the logic of the Third Circuit decisions suggests that these matters would be subject to mandatory disclosure – and thus made public – if the proper question were asked.

Within this broad range of potential disclosure topics, an employer now will be faced with an impossible task of identifying which information must be disclosed, when it must be disclosed, and to whom it must be disclosed.[6] The employer will be required to guess as to what information, if not provided, would mislead an employee in making a decision about whether to retire. That standard is extraordinarily imprecise, and places the employer at enormous peril if it guesses wrongly. As to when the information must be disclosed, the standard enunciated by the Third Circuit is that disclosure must take place at the time "serious consideration" is being given to the proposed employer action. Neither that obligation nor that standard is found in ERISA or in Department of Labor regulations, and it is, again, extraordinarily imprecise. It raises a host of questions that are not answered by the Third Circuit decisions, including the fundamental question of *who* within a corporation must be giving serious consideration to possible action. For example, if a plan amendment can only be implemented through the action of a company's board of directors, is the standard met only when the board of directors is giving serious consideration to the proposal, or is it met at the time that the company's human

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6. This dilemma will obviously be compounded for employers with nationwide operations because of the conflict among the circuit courts regarding the scope of an employer's disclosure obligations, discussed *infra* at pp. 21-25.

resources or other appropriate management group is giving consideration to submitting the question to the board for resolution?

The decisions are similarly unenlightening on the issue of to whom the employer owes this fiduciary duty. The decisions can be read as suggesting that the employer owes the duty only to employees who ask the right question. As discussed *supra* at pp. 11-12, however, this suggestion cannot be squared with a fiduciary obligation to act solely in the interest of plan participants. In addition, such a result would obviously be unprecedented in the scheme of ERISA, which requires *uniform written* disclosure to all of those individuals eligible to participate in a plan. Moreover, the disclosure obligations imposed on plan administrators throughout ERISA are affirmative in nature; it would be an extraordinary leap to infer that Congress intended that a plan administrator could choose to whom information should be disclosed on as flimsy a basis as whether a participant asks the right question, or even asks a question at all.

The Third Circuit's decisions will also, contrary to the language and intent of ERISA, create an ongoing "cat and mouse" game between employers and participants. The decision will create an incentive for an employee contemplating retirement to question the employer daily as to whether there is anything under serious consideration which the employee should know in connection with his or her retirement decision. It will also require the employer on a daily basis to balance its need for corporate confidentiality with its exposure to a fiduciary liability if it makes the wrong judgment under the imprecise standard of disclosure established by the Third Circuit.

The Third Circuit's decisions also create an unacceptable administrative uncertainty for employers as to the identification of which corporate employees must be kept advised of the status of corporate decision making in order for the employer to comply with its fiduciary obligations. Because ERISA specifically authorizes an employer to act both as a plan sponsor and plan administrator, it would be logical to assume that an employer could – as PECo did – separate those two roles by not sharing its business deliberations with individuals involved

in the day-to-day administration of the employer's plans. Surprisingly, however, the Third Circuit has held that the creation of what it termed a "Chinese wall," but what in reality is the common sense implementation of congressional intent, will not insulate an employer from its "fiduciary" obligation to disclose corporate deliberations to employees. As a practical matter, therefore, an employer will be obligated, once a corporate decision hits the "serious consideration" stage, to share the status of that decision with a broad range of supervisory employees who might be subjected to questions by participants. That range of employees might include not only the benefits counselors whom the Third Circuit considered in this case, but also firstline supervisory and management employees who might be questioned by participants about retirement decisions.[7]

The administrative chaos caused by the Third Circuit's decisions will also conflict with one of the goals expressed by Congress in enacting ERISA, which is to assist employers in controlling their costs in the administration of ERISA plans. *See Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063, 2072 (1993); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981). These

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7. This issue has more than theoretical significance. On the heels of the Third Circuit decisions in this case, a complaint was filed in the Eastern District of Pennsylvania against Bell Atlantic Corporation by a class of employees in which it is alleged that *supervisory* employees, and not benefits counselors, made misrepresentations regarding the company's plans to offer an enhanced retirement opportunity, in violation of Bell Atlantic's alleged fiduciary duty. *Zschunke v. Bell Atlantic Corp.*, C.A. No. 93-CV-3326 (E.D. Pa. filed July 21, 1993). The legal principles articulated in the Third Circuit's decisions obviously invite a spate of such litigation. Indeed, a second action based on a similar theory was dismissed for lack of standing by the district court in the Eastern District of Virginia, and an appeal has been filed. *Arthur v. Bell Atlantic Corp.*, No. 3-93-CV-854 (E.D. Va. filed Mar. 18, 1993), *appeal docketed*, No. 93-1483 (4th Cir. Apr. 26, 1993). Multiple class actions based on this theory have been filed against General Motors Corp. and IBM. *See Swinney v. General Motors Corp.*, C1-92-302 (S.D. Ohio filed Apr. 3, 1992), *appeal docketed*, No. 93-3872 (6th Cir. Aug. 20, 1993); *Sherrod v. General Motors Corp.*, 1-92-CV2036 (N.D. Ohio filed Sept. 30, 1992), *appeal docketed*, No. 93-3707 (6th Cir. July 1, 1993); *Rawlins v. IBM*, C.A. No. 92317 (E.D. Ky. filed July 30, 1992); *McAuley v. IBM*, C.A. No. 92-283 (E.D. Ky. filed July 10, 1992); *Muse v. IBM*, C.A. No. 91-122 (E.D. Ky. filed Mar. 18, 1991).

costs will rise not only because of an increase in litigation, but because of the practical decisions employers will be required to make. Additional employee resources will have to be devoted to coordinating the company's business decision making processes with its administrative disclosure procedures under its benefit plans. The premature disclosure of certain types of business decisions could adversely affect an employer's position in collective bargaining. Benefit plan amendments such as the offering of an early retirement incentive program may have to be retroactively applied, thus dramatically increasing the cost of the plan, because of liability concerns to individuals who voluntarily retired prior to the announcement of the plan. All of these factors will contribute to a substantial increase in the cost of plan administration, and will create an incentive on the part of employers to decline to adopt or enhance benefit plans, or to terminate existing benefit plans.

Finally, the Third Circuit's decisions will adversely affect the interests of shareholders. As recognized by the Third Circuit in *Payonk v. HMW Industries, supra,* as well as by other circuit court decisions, corporate management has an ongoing fiduciary obligation *to shareholders*. At times, that fiduciary obligation will mandate that certain corporate activities and decisions take place confidentially, and that the timing of disclosure of those matters be carefully considered. Because the Third Circuit has rejected the mechanism used throughout corporate America to accommodate the tension between the interests of shareholders and plan participants – the creation of what the Third Circuit termed a "Chinese wall" – the interests of shareholders will now be subordinated to those of plan participants. Such a result sacrifices the interests of many for the benefit of a few, in a manner which directly and irreconcilably conflicts with ERISA's recognition and approval of a corporate employer acting both as a plan sponsor and plan administrator.

II. The Third Circuit's Decisions Conflict With Decisions Of This Court.

The Third Circuit's unwarranted expansion of an employer's fiduciary and disclosure obligations under ERISA also

conflicts with this Court's decisions interpreting and applying ERISA. As most recently reflected in *Mertens v. Hewitt Associates*, *supra*, this Court has consistently refused to expand the scope of ERISA's remedies beyond those specifically created by Congress.

Although this Court has written extensively on various issues involving the enforcement of ERISA, it has never had occasion to address directly the principles to be followed in distinguishing an employer's conduct as the operator of a business from its conduct as a fiduciary. Nonetheless, in interpreting ERISA this Court has proceeded with care, and with proper regard for the legislative process which gave rise to "a 'comprehensive and reticulated statute,' the product of a decade of Congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063, 2066 (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)). It has also recognized that in enacting ERISA Congress resolved "innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens*, *supra*, 113 S. Ct. at 2071. In enacting ERISA, Congress carefully balanced the interest of employees in receiving benefits as promised under a plan and the interest of employers in controlling the costs associated with the delivery of those benefits. As noted by Congressman Perkins:

> It has not been easy to draft a law which protects individual pension rights and at the same time, recognizes the voluntary nature of pension plans. Each regulation has to be weighed against the burdens and pressures it imposes on the system. Each requirement has to be weighed against the cost increase which might result.

120 Cong. Rec. H1132 (daily ed. Feb. 26, 1974) (statement of Congressman Perkins), *reprinted in* 2 Legislative History Of The Employee Retirement Income Security Act of 1974, at 3369. This Court has also observed:

> No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of

> legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

PBGC v. LTV Corp., 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)).

Following that same theme, this Court in *Mertens* recently expressed a reluctance to expand ERISA beyond the language of the statute adopted by Congress:

> There is, in other words, a "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515, 101 S. Ct. 1895, 1902, 68 L.Ed. 2d 402 (1981); *see also Russell*, 473 U.S., at 148, n.17, 105 S. Ct., at 3093, n.17. We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.

Mertens, 113 S. Ct. at 2072. Congress has expressly limited an employer's fiduciary obligations, if it chooses to act as plan administrator, to complying with ERISA's reporting and disclosure requirements and meeting discretionary responsibilities and authorities *in the administration of the plan*. The Third Circuit's decisions have expanded the scope of the employer's fiduciary obligations to include communications to employees regarding matters which are admittedly business decisions, as to which the corporation and its management may owe a fiduciary obligation to shareholders, and which are unrelated to the day-to-day administration of the benefit plan. That judicial expansion of the rights and remedies in ERISA conflicts with this Court's decisions discussed above.

III. The Third Circuit's Decisions Conflict With Decisions Of Other Courts Of Appeals.

The decisions of the Third Circuit have contributed to a growing conflict among the circuits regarding the scope of an employer's fiduciary obligations under ERISA. Those conflicts involve (1) whether an employer has any fiduciary obligation

whatsoever to disclose its business deliberations to plan participants, and (2) whether an employer's fiduciary obligation can extend beyond its activities in administering a plan in accordance with its terms.

The Third Circuit has joined the Sixth Circuit in concluding that an employer can, under certain circumstances, possess a fiduciary duty under ERISA to disclose its business deliberations to plan participants. In *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993), the Sixth Circuit held that an employer breached its fiduciary duty to plan participants by failing to disclose fairly the progress of its "serious consideration" regarding the offering of an enhanced voluntary termination program. In *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), it held that an employer was under a fiduciary obligation not to materially mislead plan participants regarding the future possibility of offering enhanced retirement benefits.[8]

These decisions, along with those of the Third Circuit below, are in direct conflict with decisions of the Fourth and Seventh Circuit Courts of Appeals. In *Elmore v. Cone Mills Corp.*, Nos. 92-1362, 92-1363, 92-1404, 92-1482, 1993 WL 368872 (4th Cir. Sept. 22, 1993), the employer had stated in a letter to employees in connection with a leveraged buyout that if the buyout were successful certain surplus assets in the employee retirement plan would be contributed to an employee stock ownership plan. Upon completion of the buyout, the employer failed to make that contribution in full. The court concluded that the employer had no fiduciary obligation under ERISA to comply with its letter. In rejecting a contrary conclusion in the dissent based on *Berlin* and *Fischer*, *supra*, the court stated that the employer's "actions with regard to *announcing* the proposed pension surplus reversion and deciding not to adopt that proposal are left to its sound business discretion and

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8. The Eleventh Circuit in *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 112 S. Ct. 372 (1991), also suggested in *dictum* that, in accordance with *Berlin*, an employer may violate a fiduciary duty to plan participants by making material misrepresentations regarding its future business plans.

are not subject to the fiduciary duties imposed on plan administrators." *Elmore, supra,* 1993 WL 368872 at *20 n.16 (emphasis added).

In *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986), the plaintiff opted to take early retirement under the employer's existing pension plan. Prior to doing so, however, he specifically asked corporate management on several occasions if a financially better opportunity would be made available in the future, and advised management that he was requesting that information in connection with making his retirement decision. He was informed that the individuals to whom he addressed his questions were not aware of any such plans. 792 F.2d at 433. Nonetheless, on the date of the plaintiff's retirement, his employer put into effect a welfare plan which would have provided him with greater benefits than he received at the time of his retirement.

The Fourth Circuit rejected the plaintiff's contention that Gulf Oil's failure to disclose that it was considering the enhanced severance pay plan constituted a breach of fiduciary duty, and held that no such duty arose until the plan amendment was put into effect. As the court stated, "*[i]t is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect.*" 792 F.2d at 435 (emphasis added).

The Seventh Circuit Court of Appeals has reached a similar conclusion in two cases. In *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), the plaintiffs contended that their employer breached a fiduciary duty under ERISA "when it unilaterally amended the 1981 severance plan without providing any notice of the change to them." 849 F.2d at 1044. In rejecting that claim, the Seventh Circuit concluded that an employer can alter or eliminate employee benefits without consideration of employee interests because the act of doing so is not fiduciary in nature. 849 F.2d at 1045. In specifically rejecting the argument that some fiduciary obligation to disclose its business plans to employees arose as a result of its status as plan administrator, the Seventh Circuit stated:

> Thus, just because Amoco administered its employees' severance plan, does not mean Amoco owed a fiduciary duty of care to its employees with respect to the amendment or abolishment of that plan. Though perhaps desirable in normal business conduct, *Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of the F&P division*. We conclude the district court properly granted summary judgment on plaintiffs' breach of fiduciary claim.

Id. (emphasis added). The court reached this decision by relying upon the proposition that ERISA specifically permits an employer to act in the dual capacity of a plan sponsor and a plan administrator. *Id.*

In *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274 (7th Cir. 1985), the Seventh Circuit relied upon this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), to conclude that neither a union nor an employer is an ERISA fiduciary while it is *in the process* of negotiating the terms and conditions of future pension benefits, and specifically noted that the duties of a negotiator and a fiduciary in that context would be in conflict if the union and the employer were held to be fiduciaries. 756 F.2d at 1280. The court further concluded that, even as administrator of the plan in question, the employer "could not have breached any fiduciary duties with respect to the terms of the plan until those terms were incorporated into the plan at the conclusion of negotiations." *Id.*

The decisions of the Third Circuit, as well as *Drennan* and *Berlin*, are also in conflict with a series of circuit court decisions holding that the scope of an employer's fiduciary duty under ERISA is limited to discretionary activities undertaken in connection with the administration of the written plan document. As discussed above, the Third and Sixth Circuits have held that an employer's fiduciary obligations can extend to communications to plan participants about business decisions, even though such communications are not part of the day-to-day administration of the written plan document. The Second Circuit reached a different conclusion in *Belade v. ITT Corp.*, 909 F.2d 736 (2d

Cir. 1990), where it held that in designing an enhanced retirement program and designating those employees eligible to participate in it, the employer was not bound by ERISA's fiduciary obligations. In so doing, it concluded that no fiduciary obligation arose because in formulating the plan the employer did not "exercise authority or control over the management or administration of [the plan]." 909 F.2d at 738 (citation omitted).

In *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 493 U.S. 919 (1989), the court considered the issue of whether an employer breached a fiduciary duty by declining to provide a discharged employee with the reasons for its denial of his request for early retirement benefits. In rejecting that contention, the court stated that "[b]usiness decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits," 875 F.2d at 1079, and that the fiduciary obligations of ERISA are implicated by an employer's conduct "[w]hen an employer is administering an employee benefit plan. . . ." *Id.*

In *Fletcher v. Kroger Co.*, 942 F.2d 1137 (7th Cir. 1991), the Seventh Circuit considered a challenge to the employer's establishment of a special retirement benefits plan. In rejecting that challenge, the Seventh Circuit stated that "when an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and *administering the plan in accordance with its terms*, its actions are not to be judged by fiduciary standards." 942 F.2d at 1139 (quoting *Musto v. American Gen. Corp.*, 861 F.2d 897, 913 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989)) (emphasis added).

There is thus a substantial conflict among the circuits regarding the issues addressed by the Third Circuit's decisions. This Court should grant review to resolve those conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: October 18, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

92-1684

Herbert L. Fischer, Floyd L. Adams, James W. Alfreds, John I. Arena, Earl T. Atkinson, William Auve, Thomas F. Beck, William J. Bono, William A. Burwell, Jr., Joseph C. Calabrese, Peter Carfagno, John B. Creighton, Ralph J. DaFermo, Sr., Felix A. DeJoseph, Joseph A. DeVito, John T. Dougherty, John J. Dowling, Anthony Falasca, Eugene Fink, Rita J. Gesualdo, Joseph L. Giorgio, Edwin Haines, Joseph T. Haley, Daniel J. Hefferan, Leo M. Hill, Robert J. Hoopes, Donald J. Hoy, Michael Hrynko, Donald Hughes, Carl M. Hunsicker, Neal Ireland, Walter D. Kraus, Charles E. Lindemuth, Robert F. Mahoney, Anthony D. Marchesani, Robert P.F. McCarron, Robert McCormick, Frank L. Mercadante, John P. Monaghan, David Monzo, John K. Moore, Joseph P. Moran, Mildred Pearl Morgan, Ralph E. Moyer, Herbert E. Mueller, James J. Nugent, Thomas E. Oetzel, Frank W. Persichetti, Sr., Charles W. Plummer, Lewis Raibley, James J. Roddy, John J. Saunders, Louis F. Saunders, Nicholas J. Screnci, Joseph J. Semetti, John Steindl, William F. Thompson, Michael W. Trendler, Francis R. Tunney, Sr., Herbert R. Walters, Richard S. Wilson, John H. Zimmer and Gerald A. Zimmerman.

Appellants,

v.

THE PHILADELPHIA ELECTRIC COMPANY; JOSEPH F. PAQUETTE, JR.; MICHAEL J. CROMMIE; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 90-CV-8020)

Argued February 26, 1993

Before: MANSMANN, SCIRICA and FEINBERG,* *Circuit Judges*.

Filed May 26, 1993

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OPINION OF THE COURT

FEINBERG, Circuit Judge:

Herbert L. Fischer appeals on behalf of a class of former employees of The Philadelphia Electric Company (PECo or the Company) from an order of the United States District Court for the Eastern District of Pennsylvania denying his motion for

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* Honorable Wilfred Feinberg of the United States Court of Appeals for the Second Circuit, sitting by designation.

summary judgment and granting that of PECo.[1] Fischer alleged that the Company violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq. This appeal primarily requires us to decide whether summary judgment for PECo was proper on the record before us.

Background

Joseph F. Paquette, Jr. became PECo's Chief Executive Office and Chairman of the Board in 1988. At that time, he was concerned that PECo's staffing levels, total wages and other costs were as high or higher than the average for the utility industry. In particular, PECo had a higher number of employees per customer than did its competitors. Apparently in response to these concerns, PECo requested a $549 million rate increase from the Public Utility Commission (PUC) in July 1989. PECo knew that the PUC would make its final decision on the rate increase in April 1990. In the meantime, the Company began to look for ways to reduce costs and hired an outside consultant, McKinsey & Company (McKinsey), to develop a long-range strategic plan for cost-reduction.

In October 1989, PECo learned that the PUC staff had recommended that PECo receive only $220 million of its requested increase. Despite this news, Paquette said in a speech in December 1989 on the "state of the company" that he was optimistic that PECo would get the entire increase it requested. In responding to a question after the speech as to whether an early retirement plan had been discussed as a cost-cutting option, Paquette answered that if the Company had to reduce the number of its employees, attrition would be the preferred means of doing so, possibly accelerated by an early retirement plan. Layoffs would be a last resort.

In March 1990, an administrative law judge issued an interim ruling on PECo's requested increase, recommending that the Company be granted only $117 million, 21% of its total

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1. The named defendants are PECo, Joseph F. Paquette, Jr., Michael J. Crommie, and PECo's Service Annuity Plan, an employee pension benefits plan as defined by ERISA. The defendants will be collectively referred to as "PECo."

request. In the month before that ruling, PECo had formed a Cost Management Team to identify ways to reduce the Company's costs. Kenneth Lefkowitz, Manager of PECo's Compensation and Benefits Division, began outlining options to reduce the work force and contacted the actuarial firm of Towers, Perrin, Forster & Crosby (TPF&C) for assistance. TPF&C later sent Lefkowitz a confidential memorandum outlining three different methods of reducing the number of PECo employees, including an early retirement plan. PECo had considered such a plan in 1988, but it was never put into effect. Early in April 1990, McKinsey presented PECo's Board of Directors and top management with its list of ways to reduce costs. An early retirement plan was one of them.

The PUC issued its final order on April 19, 1990, granting PECo less than 50% of its total request. PECo responded swiftly to this decision. On that same day, Paquette wrote a letter to all employees, including those who had already announced their decision to retire, reporting the PUC's action and its financial impact on the Company. Even though no proposal had as yet been made to PECo's Board of Directors, Paquette indicated in this letter that he was going to "recommend that our Board approve an early retirement program." Paquette soon did so, and the plan, which was formally approved by the Board of Directors on May 25, provided certain options that benefitted those employees who elected to retire between July 15 and September 15, 1990.

While all this going on, some of PECo's employees were thinking about retiring. It was PECo's practice to have prospective retirees notify the Company a few months before they wished to retire so that a retirement interview could be held. The purpose of the interview was to provide the employee with information about retirement, including pension amount and options for life insurance. During the period of time relevant here, the majority of these interviews were conducted by Senior Benefits Counselor Jack McCartney, although two other counselors would fill in on an "as-needed" basis. All of these employees were under the supervision of Michael J. Crommie, the Director of the Benefits Division of PECo's Human Resources Department.

Six months before the early retirement plan was announced, rumors about it had already begun to circulate among PECo's employees. Prompted by these rumors, some prospective retirees asked the benefits counselors about the possibility that such a plan would be adopted. Until April 19, 1990, the date on which Paquette announced he would recommend a plan to the Board, the counselors answered that no plan was being considered, or that they had no knowledge of any plan. As far as the benefits counselors knew, they were telling the truth since the Company had not kept them abreast of any discussions taking place among senior management. Moreover, Director Crommie had instructed his counselors that if interviewees asked any questions, they were to be told "exactly what the plan called for at that time."

The plaintiffs in this case are PECo employees who retired on January 1, 1990, February 1, 1990, March 1, 1990, and April 1, 1990 and were therefore ineligible to obtain the benefits provided by the early retirement plan, but otherwise would have been eligible. Plaintiffs alleged that PECo breached its fiduciary duties under §404 of ERISA; that PECo is estopped from denying the class members increased pension benefits; and that PECo engaged in discriminatory conduct in violation of §510 of ERISA. After the class was certified, the parties cross-moved for summary judgment. The district court granted PECo's motion and denied plaintiffs' motion.

This appeal followed.

Discussion

Our review of an order granting summary judgment is plenary. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "However, when the record is such that it would not support a rational finding that an essential element of the nonmoving party's claim or defense exists, summary judgment must be entered for the moving party." *Turner v. Schering-Plough*

Corp., 901 F.2d 335, 341 (3d Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

A. Breach of Fiduciary Duty

ERISA allows employers "to wear 'two hats,' " *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), and PECo did so. It was both an employer and a plan administrator. As an employer, neither PECo nor its business decision to offer an early retirement program were subject to ERISA's fiduciary duties. *See*, e.g., *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989). As a plan administrator under ERISA, however, PECo was a fiduciary and was required, among other things, "to discharge [its] duties 'solely in the interests of the participants and beneficiaries.' " *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir.) (quoting 29 U.S.C. §1104(a)(1)), *cert. denied*, 459 U.S. 1069 (1982).

Plaintiffs concede that PECo had the right as an employer to make the business decision of how much and when to enhance pension benefits, but argue that PECo also had an obligation under ERISA to tell the truth about such decisions when asked by plan participants. For this proposition, plaintiffs rely principally on *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), which, they assert, this court embraced in *Payonk v. HMW Indus., Inc.*, 883 F.2d 221 (3d Cir. 1989). According to plaintiffs, PECo breached its obligation through a "conspiracy of silence among senior management aimed at keeping confidential the considerable efforts being taken to implement an early retirement incentive program."

In *Berlin*, Michigan Bell announced that it would offer early retirement benefits to employees who retired between June 1 and July 31, 1982. This retirement "sweetener" was announced in June 1982, but plaintiffs there alleged that Michigan Bell had been considering such a plan as early as December 1, 1980. The plaintiffs in *Berlin* were employees of Michigan Bell who retired after December 1, 1980 but before June 1, 1982 and who were consequently unable to take advantage of the sweetener. According to the *Berlin* plaintiffs, Michigan Bell breached its fiduciary obligations under ERISA by misleading them into

believing that no early retirement plan was in the offing when such a plan was in fact being seriously considered. *See Berlin*, 858 F.2d at 1158.

The *Berlin* court recognized that a "purely business decision[ ]," such as a decision "to reduce the amount of unaccrued plan benefits" or to establish or terminate a plan, is not subject to ERISA's fiduciary duties. *Id.* at 1163. But the court rejected the view that "any communications or representations made prior to such a decision were also nonfiduciary." *Id.* The court held that "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. §1104 are owed." *Id.* More specifically, it held that once Michigan Bell gave "serious consideration" to offering additional benefits, it was under an obligation as plan fiduciary "not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning [the offering]." *Id.* at 1163-64; *accord Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992); *Baumgardner v. Inco Alloy Int'l, Inc.*, 746 F. Supp. 623, 627 (E.D. La. ~~1990); *cf.*,~~ *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991), *cert denied*, 112 S. Ct. 372 (1991).

In *Payonk*, we considered a factual scenario akin to that presented in *Berlin*. HMW Industries (HMW) had two subsidiaries, referred to in *Payonk* as Metals and Wallace, both of which announced new employee benefits plans after being acquired by another corporation. Some Metals and Wallace employees opted to participate in these plans, rolling over their contributions from HMW's plan — the plan in which they had formerly participated — into the new ones. Later, HMW decided to terminate its plan, distribute the surplus and establish a new plan of its own. In accordance with federal regulations, HMW notified plan participants 10 days before the scheduled termination of the plan. *See Payonk*, 883 F.2d at 222-24.

Metals and Wallace employees who were ineligible to share in the surplus because they had rolled over their contributions before the HMW plan was terminated sued HMW under ERISA, arguing that HMW was under a fiduciary duty to disclose the termination even before the 10-day period specified in the federal regulations. Unlike the plaintiffs in *Berlin*,

however, the plaintiffs in *Payonk* made no claim that HMW had mislead them about its intention to terminate the plan. *See id.* at 226. Judge Garth's opinion in *Payonk* noted this crucial distinction and went on to hold that "an employer's lawful termination decision, *absent affirmative misrepresentations designed to mislead plan participants*, is not governed by ERISA's standards of fiduciary duties." *Id.* at 229 (emphasis supplied). None of the three opinions of the panel in *Payonk* expressed disapproval of the result in *Berlin* on the facts of that case.[2]

On its face, the present case appears closer to the facts of *Berlin* than to those of *Payonk*. In *Payonk* the "record reveal[ed] no claims or assertions that HMW had misrepresented its termination decision." *Id.* at 226. In *Berlin*, by contrast, the "pivotal allegation" of the complaint was that Michigan Bell had "either knowingly or negligently made material misrepresentations" regarding a change to the plan during a period of time in which the change was under "serious consideration." *Berlin*, 858 F.2d at 1160, 1163. The same is true here. The entire basis for plaintiffs' complaint is that PECo, mainly through its benefits counselors, misrepresented what was really going on when members of the plaintiff class asked if the Company was considering an early retirement plan.

Yet, the district court here held that the facts of this case are more like those in *Payonk*, not *Berlin*. The court reached this conclusion because it found "no evidence of affirmative material misrepresentation by a fiduciary or nonfiduciary of PECo." Although we have no quarrel with the proposition, derived from *Payonk*, that a fiduciary may not make affirmative material

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2. Judge Stapleton filed a concurring opinion. He join(ed) in affirming the district court . . . "because [he] believe[d] that the information HMW and the other defendants [were] accused of having withheld was held by them in a fiduciary capacity for the corporation and its stockholders and not in a fiduciary capacity for plan participants." *Payonk*, 883 F.2d at 231. Accordingly, he could "perceive no basis for imposing a duty of disclosure" upon defendants. *Id.* at 232. Judge Mansmann dissented, concluding that "HMW had a duty under both §404 of ERISA (29 U.S.C.A. §1104) and §16.2 of the HMW Plan to inform the participants, facing a decision of whether to withdraw from the Plan, of the impending termination." *Id.* at 236.

misrepresentations, we believe that the district court's characterization of the record was incorrect.

Consider first the statements made by Michigan Bell in *Berlin*. For example, when Michigan Bell's Vice-President-Personnel "spoke to different groups" of lower-level managers and potential beneficiaries of an early retirement plan, he was consistently asked about the possibility of such a plan being implemented. Just as consistently, he would "respond[ ] with '[c]omments to the extent that there were no current plans to offer [an early retirement plan].'" *Id.* at 1159. Similarly, the "stock answer" given by the district manager of Michigan Bell's Benefits Office was that there were "no plans for a[n] [early retirement plan] . . .' " *Id.*

Now consider the statements allegedly made by PECo. One employee said in answer to Interrogatories that when he asked Counselor McCartney (who conducted most of the retirement interviews) about an early retirement plan, McCartney "told [him] absolutely not for at least the next five years." Another indicated that McCartney "stated there was definitely nothing in the planning." According to another, McCartney said that "there was no word of any early out incentive plan (sweetener) but not to worry because Philadelphia Electric would take care of me if there was any change in the present retirement policy." Still another employee asked Director Crommie himself "whether there would be a sweetener package coming out on or about the time [he] would retire," to which "Crommie said there would be no such action." Finally, consider the statement in the record before us of one employee who retired on March 1, 1990, less than two months before Paquette's April 19 letter announcing the early retirement plan.

> If I had only known of the retirement package I would have waited to retire. I had 41 years of dedicated service to PECo. My family was just as dedicated day and night for 41 years. I feel that we should have been told of the sweetener. If I knew one was coming I would have waited to retire. I feel hurt and deceived that I was not given the opportunity of the early retirement package.

To our ear, the alleged responses given above echo those given by Michigan Bell in *Berlin*, and they suffice to preclude summary judgment.

Nonetheless, PECo argues that these communications cannot be characterized as "affirmative misrepresentations" because "when the benefits counselors . . . stated that they knew of no [early retirement] plan, their representations were correct." The counselors were telling the truth, PECo explains, because the Company had never told them it was considering an early retirement plan. Moreover, Director Crommie apparently decided to keep himself out of the loop: According to plaintiffs, Crommie said in his deposition, "[I]f management wanted me to know anything, they would have instructed me so." This explanation will not do, for the fiduciary obligations owed to the participants were owed by *PECo* as plan administrator. These obligations cannot be circumvented by building a "Chinese wall" around those employees on whom plan participants reasonably rely for important information and guidance about retirement.

As did the court in *Berlin*, we hasten to add that ERISA does not impose a "duty of clairvoyance" on fiduciaries. *Id.* at 1164. An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, "a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the [collective] bargaining process." *Drennan*, 977 F.2d at 251 (citing *Payonk*, 883 F.2d at 226); *cf. Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 751 (D.C. Cir. 1990) ("This duty to communicate complete and correct material information about a beneficiary's status and options is not a novel idea."). A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must speak truthfully.

The content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of fact on remand. *See*

Berlin, 858 F.2d at 1164; *Drennan*, 977 F.2d at 251. Whether an affirmative misrepresentation was "material," however, is a "mixed question of law and fact." *Cf. Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 280 n.11 (3d Cir.), *cert. denied*, 113 S. Ct. 365 (1992). In the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 232-41 (1988) (applying materiality standard to preliminary merger discussions); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (elaborating concept of materiality in context of proxy solicitation). Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality.

Summary judgment on "the question of materiality" is appropriate only if "reasonable minds cannot differ." *Id.* at 450 (internal quotations omitted). In the present case, there remain, among other things, open questions of how seriously PECo was considering an early retirement program at the times when the plaintiffs made the various inquiries that elicited the alleged misrepresentations. On the record before us, therefore, we believe it inappropriate to rule, as a matter of law, on the materiality of the misrepresentations allegedly made by PECo to the plaintiffs.

B. Estoppel & Discrimination

In addition to urging breach of fiduciary duty as a basis for recovery, plaintiffs seek to recover on a theory of estoppel, arguing that "estoppel is available as a federal common law remedy under ERISA to recover benefits which the plaintiffs did not receive as a result of the defendants' misleading statements." Plaintiffs also seek to recover under §510 of ERISA, which makes it "unlawful for any person to discharge, fine, suspend,

expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . ." 29 U.S.C. §1140.

The district court concluded that neither estoppel nor §510 could provide a basis for recovery, in part because it believed there was no genuine issue of material fact as to whether or not PECo had made affirmative material misrepresentations. For reasons given above, we think that there are such issues, which remain to be resolved in the district court. Therefore, we also remand on plaintiffs' claims of estoppel and discrimination without in any way suggesting a view on the merits.

For the foregoing reasons, the judgment of the district court granting summary judgment for PECo will be reversed and the case will be remanded for proceedings consistent with this opinion. For the same reasons, plaintiffs' request that we order the district court to enter summary judgment in their favor will be denied.

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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

92-1685

DONALD R. KURZ, WILLIAM W. ANDERSON; JAMES W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANELY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG.

Appellants,

v.

THE PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ; J.L. EVERETT, III; JOHN H. AUSTIN, JR.

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 91-CV-2271)

Argued February 26, 1993

Before: MANSMANN, SCIRICA and FEINBERG,* Circuit Judges.

Filed May 26, 1993

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OPINION OF THE COURT

FEINBERG, Circuit Judge:

Donald R. Kurz appeals on behalf of a class of former employees of the Philadelphia Electric Company (PECo or the Company) from an order of the United States District Court for the Eastern District of Pennsylvania denying his motion for summary judgment and granting that of PECo.[1] Kurz alleged

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* Honorable Wilfred Feinberg of the United States Court of Appeals for the Second Circuit, sitting by designation.

1. The named defendants are PECo. Charles L. Fritz, J.L. Everett, III, John H. Austin, Jr., and PECo's Service Annuity Plan. The defendants will be collectively referred to as "PECo."

that the Company violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. The issues before us are similar to those raised in *Fisher v. Philadelphia Elec. Co.*, No. 92-1684, slip op._____ (3rd Cir. _____, _____, 1993), which we also decide today. This appeal, like the appeal in *Fischer*, primarily requires us to decide whether summary judgment for PECo was proper on the record before us.

Background

On behalf of its employees, PECo administers an employee pension benefit plan known as the Service Annuity Plan (the Plan), the same plan at issue in *Fischer*. To keep track of how the Plan compares to those of other utilities, PECo has from at least as early as 1977 participated in annual or bi-annual surveys of employee pension benefits offered by companies in the utility industry. These surveys were conducted by the Public Service Electric and Gas Company before 1986 and thereafter by PECo itself. At least once in the past, PECo amended the Plan to increase benefits after one such survey showed that PECo's benefits were comparatively low. The Pension Survey Report for the year 1986 would be issued sometime in 1987.

Throughout 1986 and into 1987, the Independent Group Association (IGA), a PECo employee organization, expressed concern to the Company about the Plan and pressed for improved benefits. In March 1987, Charles L. Fritz was Vice-President of Personnel and Industrial Relations and Chairman of the Service Annuity Board. Fritz responded to IGA's concerns and met with its Executive Committee to discuss the Company's wage and benefits package expected later in the year. In the course of that meeting, Fritz "remarked generally that the timing was right to make a significant change to the pension plan and that [the Company] had been looking at different ways of making a change to the pension [plan]." Discussions about proposed changes to the Plan continued at another meeting held the following month.

Meanwhile, as early as February 1987, the actuarial firm of Towers, Perrin, Forster & Crosby (TPF&C) had been put to work by PECo to evaluate a formula to change the Plan to enhance benefits. In March, TPF&C Vice-President Donald Fleischer held a meeting at PECo to discuss the alternative formulas to be considered, some of which TPF&C started "pricing" or "costing out." Officials from TPF&C and PECo held what was apparently a final meeting around May 20, at which time various alternatives were discussed. On May 22, TPF&C sent PECo Vice-President Fritz a letter summarizing the firm's comments, recommendations and conclusions.

On that same day, PECo issued its 1986 Pension Survey Report comparing PECo's benefits to those of other utility companies. According to one official in PECo's Personnel and Industrial Relations Department, the Report showed that PECo "was below the midpoint and significantly below the midpoint for all managements cases." In other words, compared to other utility companies, the pension benefits offered by PECo "had become fairly non-competitive." The Report concluded that "the time for pension change . . . had arrived" and recommended adopting one of the proposals on which TPF&C had been working.

Based on this recommendation, Fritz requested and obtained permission from J. L. Everett, III, then PECo's Chief Executive Officer, and John H. Austin, Jr., then PECo's President and Chief Operating Officer, to recommend a change to the Board of Directors. Thereafter, a formal proposal to change the Plan was made to the Board and approved on June 22. The change was announced in the Company's official bulletin on July 2. The improvement to the Plan provided a substantial increase (approximately 17.6%) in the pension for those employees with over 40 years of service who retired at age 65.

In accordance with Company policy, all studies relating to the proposed change had been kept confidential, at least until the change was formally adopted. As in *Fischer*, this policy of confidentiality, which plaintiffs describe as a "conspiracy of silence," extended even to PECo's benefits counselors, whose job it was to provide prospective retirees with information about retirement benefits. Like the plaintiffs in *Fischer*, members of

the plaintiff class here attended individual retirement interviews, the majority of which were conducted by Senior Benefits Counselor Jack McCartney. During these interviews, some class members asked the counselors whether or not any change to the Plan was being considered. The benefits counselors, however, knew nothing of the change until it was announced. Indeed, they had been instructed "to give employees the facts as of [the time of the interview], and . . . not to speculate."

The plaintiffs in this case are former employees of PECo who retired between February 1 and June 1, 1987, and who were therefore ineligible to benefit from the change to the Plan. (Those employees who had scheduled retirement on July 1 were allowed to change their retirement date in order to take advantage of the change to the Plan, which became effective on August 1). As did the plaintiffs in *Fischer*, plaintiffs here allege that PECo breached its fiduciary duties under § 404 of ERISA; that PECo is estopped from denying the class members increased pension benefits; and that PECo engaged in discriminatory conduct in violation of § 510 of ERISA. After the class was certified, the parties cross-moved for summary judgment. The district court granted PECo's motion and denied plaintiffs' motion.

This appeal followed.

Discussion

Our review of an order granting summary judgment is plenary. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "However, when the record is such that it would not support a rational finding that an essential element of the nonmoving party's claim or defense exists, summary judgment must be entered for the moving party." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 (3rd Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

We held in *Fischer* that a plan administrator, in response to inquiries from plan participants, "may not make affirmative

material misrepresentations . . . about changes to an employee pension benefits plan." *Fischer*, slip op. at 10. We held in addition that a company could not circumvent this obligation "by building a 'Chinese wall' around those employees on whom plan participants reasonably rely for important information and guidance about retirement." *Id.* at 10. It was thus irrelevant in *Fischer*, as it is here, that the responses PECo's benefits counselors gave to questions asked of them were truthful based on what the counselors themselves knew at the time. *Fischer* governs our approach in this case.

As in *Fischer*, the district court here granted PECo's motion for summary judgment because it found that plaintiffs "failed to produce any evidence" that PECo made affirmative material misrepresentations. For substantially the same reasons we gave in *Fischer*, we disagree.

PECo treated the members of the class in this case much as it did the class members in *Fischer*. For example, according to statements given in response to interrogatories, one plaintiff asked Counselor McCartney during a retirement interview in February 1987 "if anything was coming out in the August [retirement] package." McCartney "said no." Another employee recalled that in response to similar inquiries McCartney gave "a specific negative answer." Still another asked Vice-President Fritz – the PECo official responsible for recommending pension changes to PECo's CEO – about rumors of a change. Fritz said that "as far as he knew, there was nothing." This was sometime in March 1987, the same month in which Fritz remarked during his meeting with the IGA Executive Committee that "the timing was right to make a significant change to the pension plan."

Citing *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), PECo argues that "no plan could be said to have been under serious consideration until it was proposed to the Board for discussion" on June 16, 1987 and that plaintiffs have presented "no evidence of any affirmative misrepresentation[s]" after that time. In *Fischer*, we held that a plan administrator cannot make affirmative *material* misrepresentations to plan participants in response to direct inquiries and that "[i]ncluded within the overall materiality inquiry will be an inquiry into the

seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made." *Fischer*, slip op. at 11. Under the analysis in *Fischer*, PECo's claim is that an affirmative misrepresentation is not material unless it is made after "serious consideration" has been given to a change and, furthermore, that a change can be said to have been "seriously considered" only after it has been formally proposed to the Board of Directors.

We recognize that such a bright-line rule would be easier to administer than the materiality standard embraced in *Fischer*. On the other hand, as the Supreme Court noted in another context, "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Basic Inc. v. Levinson*, 485 U.S. 224,236 (1988). Tying "serious consideration" to a single objective event in the present context would work unfairly in some instances.

In *Fischer*, for example, PECo's proposed rule would have meant that the letter, sent by the Company CEO to all employees announcing that an early retirement plan would soon be proposed to the Board of Directors, could not have amounted to "serious consideration" since no proposal had as yet been submitted to the Board. Yet in that case PECo took it upon itself to voluntarily notify its employees about the anticipated change even before making a formal proposal to the Board. To us, this action suggests that PECo itself believed that fairness required not only that it answer employee inquiries truthfully but also that it actually disclose its plans without any specific inquiry, even though the bright-line rule it suggests here would not have been satisfied.

Though we reject the rule PECo proposes, we emphasize that PECo is entitled to argue to the trier of fact, among other things, that the statements it allegedly made were not material because, at the time those statements were made, the amendment to the plan was not under serious consideration. It must be kept in mind, however, that the ultimate inquiry is whether there is a "substantial likelihood" that the affirmative misrepresentation "would mislead a reasonable employee in making an

adequately informed decision about if and when to retire." *Fischer*, slip op. at 11.

In any event, the statements described above, like those in *Fischer*, are sufficient to preclude summary judgment as to whether or not PECo made any affirmative misrepresentations and as to whether or not those misrepresentations, if any, were material. Because the district court's decision to grant PECo's summary judgment motion on each of plaintiffs' three claims was based in part on its erroneous view that there was no evidence that PECo made affirmative material misrepresentations, summary judgment was improper. As in *Fischer*, we do not express any view on the merits of any of plaintiffs' claims.

Accordingly, we will reverse the judgment of the district court granting summary judgment to PECo and will remand the case for proceedings consistent with this opinion. For the same reasons, plaintiffs' request that we order the district court to enter summary judgment in their favor will be denied.

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Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, et al V. PHILADELPHIA ELECTRIC CO., et al.	:	C.A. NO. 90-8020 July 29, 1992
DONALD R. KURZ, et al. V. PHILADELPHIA ELECTRIC CO., et al.	:	C.A. NO. 91-2771 July 27, 1992

WEINER, J.

MEMORANDUM OPINION AND ORDER

Introduction

Plaintiffs in these two consolidated matters, Donald R. Kurz, et al. and Herbert L. Fischer, et al. are former employees of the Philadelphia Electric Company ("PECO"). They have brought these actions on behalf of classes of like situated former PECO employees to recover additional pension benefits. Named as defendants in the actions are PECO, its pension plan and its key employees charged with making pension plan decisions at the relevant times of these two lawsuits. The actions are based upon the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C § 1101, et seq. and arise out of changes, made at two different time periods, to the PECO pension plan. Plaintiffs claim the defendants: violated fiduciary duties under ERISA, are equitably estopped under ERISA from denying the plaintiffs increased pension benefits, and have engaged in discriminatory conduct in violation of § 510 of ERISA, 29 U.S.C § 1140.

PROCEDURAL HISTORY

Although the facts alleged by plaintiff Kurz occurred first in time, plaintiff Fischer's complaint was first to be filed. The Kurz action was then consolidated with Fischer for coordinated proceedings. On August 29, 1991, the court certified a class in the Kurz action consisting of all those former employees of PECO who retired from the company from January 1987 through and including June 1, 1987. The court certified a class in the Fischer action consisting of all those former employees of PECO who retired on January, February, March or April 1, 1990, who would have reached age 50 by December 31, 1990 and who would have completed five or more credited years of service.

Presently before the court are the parties' cross-motions for summary judgement. The motions are based upon lengthy joint stipulations of facts prepared for each matter, supplemented by deposition transcripts. Briefly, the disputes in these matters concern the duties of company officials to advise soon to retire employees about possible changes in retirement benefits. For the reasons which follow, we find the plaintiffs have failed to prove to state a cause of action against the PECO defendants involving conduct violative of ERISA. Accordingly, the motions of the PECO defendants in these cases will be granted and the motions of the plaintiff classes will be denied.

FACTS

The parties in *Fischer* stipulate to the following facts for purposes of their motions for summary judgement:

1. Philadelphia Electric Company ("PECO") maintains a service Annuity Plan for the benefit of its employees.

2. The Service Annuity Plan is an employee pension benefit plan as defined by the Employee Retirement Income Security Act ("ERISA").

3. Under the terms of the Service Annuity Plan PECO is the Administrator of the plan, and may delegate its duties as administrator. [*Paquette Deposition*, p. 13].

4. Named plaintiffs (hereinafter "plaintiffs" are former employees of PECO, and seek to represent a purported class of

employees who retired January 1, 1990, February 1, 1990, March 1, 1990 or April 1, 1990; who would have reached age 50 on or before December 31, 1990; and who would have completed five or more years of credited service under the company's Pension Plan as of December 31, 1990, had they still been employed by PECO at that time.

5. Plaintiffs are participants in the Service Annuity Plan (effective January 1, 1987, as amended August 1, 1987) (hereinafter "Annuity Plan") provided to PECO employees. Plaintiffs retired in accordance with the Annuity Plan and are receiving monthly benefit payments in accordance with that Annuity Plan.

6. The named plaintiffs do not claim that they are being or have been denied the benefits to which they are and were entitled under the Service Annuity Plan that was in effect at the time they retired.

7. In 1989 and early 1990,

- Joseph F. Paquette, Jr. was the Chief Executive Officer and the Chairman of the Board of PECO;
- James Durham was the General Counsel for PECO; from October 1989 to October 1990 he was the acting Vice President of Human Resources;
- M. Joseph Friderichs was the Manager of Corporate Planning and Analysis of PECO;
- Kenneth Lefkowitz was the Manager of the Compensation and Benefits division of PECO;
- Michael J. Crommie was the Director of the Benefits Division of the Human Resources Department of PECO;
- Frederick J. Beaver was an Administrative Assistant in the Benefits Division of the Human Resources Department of PECO until September 1989; in September 1989 he was named Supervisor in the Benefits Division of the Human Resources Department;

- Jerry Wagner was a Staff Assistant in the Benefits Division of the Human Resources Department of PECO;

- Jack McCartney was the Senior Benefits Counselor in the Benefits Division in the Human Resources Department of PECO.

[*McCartney Deposition*, 7/17/91, pp. 17-18].

8. Mr. Paquette is and was (since he became CEO) in charge of long-range strategic planning. [*Paquette Deposition*, p. 35].

9. Since 1988, when he became CEO, Mr. Paquette has been concerned about PECO's staffing levels, total wages and other cost elements, all of which were high or higher than average for the industry. PECO had a higher number of employees per customer than was average for the industry. [*Paquette Deposition*, p. 19].

10. PECO conducts periodic manpower studies as part of its overall performance evaluation of the company. [*Friderichs Deposition*, p. 16].

11. From 1982 to 1991 Joseph Friderichs was responsible for conducting these periodic manpower studies. [*Friderichs Deposition*, p. 16].

12. PECO's manpower studies were based, in part, on studies that compared staffing levels among utilities throughout the region. [*Friderichs Deposition*, p. 16].

13. In July of 1989 PECO requested a $549,000,000 rate increase from the Public Utility Commission ("PUC").

14. Thomas Hill was the Controller of Philadelphia Electric Company in 1990. In 1989, his primary responsibility was handling the proceedings before the PUC for a rate increase which was filed in July, 1989. [*Hill Deposition*].

15. Thomas Hill was aware in July, 1989, when the initial rate increase request papers were filed with the PUC that the final decision regarding the rate increase request would be made by the PUC in April, 1990. [*Hill Deposition*].

16. On or about August 4, 1989, Mr. Paquette asked Mr. Friderichs to suggest consultants to assist in a strategic planning

effort for Philadelphia Electric Company. [Bates Document No. 003638; *Paquette Deposition*, p. 161].

17. In October 1989 PECO learned that the PUC staff had recommended that PECO receive only $220,000,000 of the requested increase. [*Paquette Deposition*, p. 44].

18. In November 1989 PECO hired McKinsey and Company, a consulting firm, to assist in the development of a new corporate strategy, which included an overall evaluation of PECO, a long-term strategic plan for cost-reduction. [Bates Document No. 3637].

19. In or around November 1989, Joseph Friderichs was put in charge of coordinating the McKinsey study, at the request of Joseph Paquette. [*Friderichs Deposition*, p. 25].

20. Over the next several months McKinsey evaluated and identified cost reduction opportunities throughout the company, including manpower, materials management, work design, labor management, contractors, fuel, capital expenditures and other areas of potential cost savings. With respect to its analysis of staffing levels, McKinsey considered, among other things, comparisons of staffing levels among utilities within the region.

21. In December, 1989, Joseph Paquette held some "state of the company" speeches in which he discussed where the company was headed in the future, and answered employee questions. Mr. Paquette discussed the rate increase request, and stated that he was optimistic that the Company would get the request. In response to a question posed by an employee about whether an early retirement plan had been discussed as a cost cutting option, Mr. Paquette responded that if PECO decides they have to reduce the number of people in the company, the priorities would be to reduce employees by attrition, possibly an early retirement program. The last choice would be lay-offs. [Bates Document No. 003227].

22. During the meeting held by Mr. Paquette on December 13, 1989 at approximately 1:30 p.m., Mr. Paquette made the following comments in response to a question by an employee as to whether management had any plan if PECO did not get the rate increase requested from the PUC:

"Well, no, we don't have a specific plan at this time because we're not sure — if we don't get enough of a rate increase, we're not sure exactly where we're going to end up on that rate curve and we'll have time when we get the PUC's order — incidentally, the commission will make a final decision by April 20, but we will get an earlier indication around the middle of February because at that time the administrative law judges who are hearing the case, the rate case, will submit their recommendation to the PUC as to how much of a rate increase we should get and generally the PUC's final decision is somewhat very close to the ALJs' report. So that February 15 report will be very critical in giving us a pretty good indication of what we're going to get. So after that time we'll start looking at what our alternatives are." [*Paquette Deposition*, pp. 63]

23. In *Perspectives*, dated December 22, 1989, James Durham stated that PECO expected to receive a ruling by the PUC in mid-April of 1990.

24. In accordance with PECO's policy for "efficient and economic work force distribution," it has been PECO's long-standing corporate policy to avoid layoffs wherever possible. One of the steps to be taken to avoid layoffs according to the PECO policy is "an early retirement offer, or a selective termination allowance [which] will be considered and, if practicable, implemented." [Exhibit Beaver-2].

25. Mr. Paquette's "state of the company" speech was published in *Perspectives* on February 2, 1990.

26. On January 24, 1990, McKinsey and Company presented an initial progress report based upon their initial diagnosis including factual, statistical diagnoses and interviews with a number of officers and management people. The initial report was presented to senior management. [*Friderichs Deposition*, pp. 43-44; Bates Document Nos. 002217-002261].

27. Joseph Friderichs was aware before January, 1990 that comparative studies indicated PECO had too many employees in specific departments. [*Friderichs Deposition*, pp. 47-48].

28. In February 1990, Thomas Hill, PECO's Controller, was put in charge of the Cost Management Team, which grew out

of PECO's long-term strategic planning. The Cost Management Team worked with McKinsey towards the goal of identifying means of reducing PECO's costs. [*Friderichs Deposition*, p. 52].

29. On March 1, 1990, the Administrative Law Judges issued an interim decision on PECO's rate increase application. In that decision, the ALJs recommended to the PUC that PECO receive only $117 million, or 21% of the full amount of its requested increase. This decision was reported in *Perspectives* on March 2, 1990. [*Perspectives* March 2, 1990].

30. In the March 16, 1990 edition of *Perspectives* it was reported that immediately following the March 1, 1990 recommendation of the ALJs to the PUC, PECO took a number of interim steps designed to intensify its cost control efforts. [Bates Document No. 003795].

31. On March 20 or March 25, 1990, Mr. Friderichs prepared a memorandum comparing Philadelphia Electric Company employees by major function or department to the median number of employees as documented by the study of an unrelated company, known as TBS. A copy of this memorandum was provided to Mr. Paquette and senior officers. [*Friderichs Deposition*, pp. 7178]. [Bates Document Nos. 3252-3257].

32. On March 27, 1990, senior management (including Joseph Paquette) met with the Cost Management Team and a representative of McKinsey to discuss various means of achieving a cost reduction of somewhere between $110,000,000 and $220,000,000. [*Friderichs Deposition*, pp. 83,86; Bates Document Nos. 2420-2505].

33. A document dated March 27, 1990 contains McKinsey's analysis of the numerical impact of reductions of various staffing levels and identifies a number of options for achieving those reductions. [*Friderichs Deposition*, p. 32]

34. Mr. Hill prepared a memorandum in connection with the March 27 meeting of the cost management team in which he discussed a potential for a $110-$220 million per year expense reduction. [Bates Document No. 003261].

35. On March 30, 1990, Larry Kanarch of McKinsey sent a letter to Mr. Friderichs concerning the issues for the upcoming

cost reducing meeting with senior management. Questions regarding headcount were raised. [Bates Document Nos. 3281-3282].

36. As of March 30, 1990, Mr. Friderichs, the Manager of Corporate Planning and Analysis, prepared an analysis of the PECO personnel and contractor count, as compared to the June, 1989 study by TBS. Mr. Paquette reviewed a copy of this comparison report. [*Paquette Deposition*, p. 137; Bates Document Nos. 003263-003267].

37. At an April 2, 1990 meeting with senior management, McKinsey reported on its progress in strategic planning. [*Friderichs Deposition*, p. 90; Bates Document No. 3274].

38. Mr. Friderichs prepared a memorandum to Joseph Paquette and others, dated April 3, 1990, comparing PECO's manpower to the manpower of other "electric only" utilities. [*Friderichs Deposition*, pp. 98-102; Bates Document No. 003275].

39. On April 4, 1990, McKinsey gave a progress report to PECO's Board of Directors and presented possibilities for improving efficiency and reducing the annual rate of expenditures by $100,000,000 by the end of December 1991. [*Friderichs Deposition*, p. 105; Bates Document No. 3286]. Included in McKinsey's list of possibilities was an early retirement opportunity for all staff personnel.

40. On April 7, 1990, McKinsey and the Cost Management Team presented to the vice presidents substantially the same information that they had presented to the senior officers on April 2nd and to the Board of Directors on April 4th. [*Friderichs Deposition*, pp. 59,64].

41. As of April 7, 1990, Mr. Paquette indicated that on April 20 he would announce to employees the proposed programs for achieving the $100,000,000 expense reduction. [*Friderichs Deposition*, p. 126].

42. As of April 7, 1990, Mr. Paquette had requested that there be no discussion at that time with employees regarding the changes suggested by the McKinsey cost management team because, as of that date, the Board of Directors had made no decisions and he did not want to cause undue speculation by

employees. [*Friderichs Deposition*, pp. 62-65, 127; Bates Document No. 002650].

43. On April 19, 1990, PECO's senior management met with the Cost Management Team and with representatives of McKinsey.

44. On April 19, 1990, the PUC issued its final order on PECO's rate request, granting PECO less than 50% of the amount it had requested.

45. On April 19, 1990, Mr. Paquette wrote a letter to all employees, including those who had already announced their decision to retire, which referred to The Public Utility Commission's denial of PECO's rate request, and the financial impact of that denial. He stated that he was going to "recommend that our Board approve an early retirement program."

46. Mr. Lefkowitz was put in charge of developing the early retirement incentive plan. [*Paquette Deposition*, p. 102].

47. Mr. Lefkowitz had already contacted Towers, Perrin, Forster & Crosby ("TPF&C"), an actuarial firm, on March 12, 1990 to discuss options for reducing the work force. [*Lefkowitz Deposition*, p. 36].

48. Around mid-March, 1990, Mr. Lefkowitz had two or three telephone conversations with William Murdoch, Jr., Vice President of TPF&C, regarding alternative methods for a reduction in force, including early retirement incentives. [*Lefkowitz Deposition*, pp. 35-36].

49. Mr. Lefkowitz testified that he began outlining options for reducing the work force as a result of the ALJs' March 1 interim decision, knowing that an adverse final order could have a negative impact on the company.

50. Mr. Lefkowitz did not begin working for PECO until February 1989. [*Lefkowitz Deposition*, p. 1].

51. On March 28, 1990, Mr. Murdoch of TPF&C sent a confidential memorandum to Kenneth Lefkowitz outlining three alternative "open window" programs for a proposed staff reduction in response to the telephone conversations Mr. Lefkowitz had with TPF&C. [*Lefkowitz Deposition*, pp. 91-92; Bates Document Nos. 003450-003475].

52. At the end of March, 1990, Mr. Lefkowitz prepared a handwritten document entitled RIF (meaning reduction in

force), which he sent to Mr. Paquette on April 2, 1990. [*Lefkowitz Deposition*, pp. 24-25, 30-33, 57-58; Bates Document Nos. 001894-001901].

53. Mr. Lefkowitz reviewed his reduction in force considerations and models with Mr. Durham before submitting these materials to Mr. Paquette. [Bates Document No. 001894].

54. One of the options for work force reduction proposed by TPF&C on March 28, 1990, was a voluntary improved early retirement pension benefit plus special severance pay allowance. TPF&C and PECO had considered the same options in June, 1988. [Bates Document No. 003453].

55. PECO had offered a few early retirement programs before 1990. [*Paquette Deposition*, p. 39]. The last early retirement program was offered by the company in 1978.

56. Mr. Lefkowitz did not talk to Michael Crommie about his discussions with TPF&C in the spring of 1990. [*Lefkowitz Deposition*, p. 38].

57. Mr. Lefkowitz did not consider letting prospective retirees know about the "possibility" that PECO might implement an early retirement program. [*Lefkowitz Deposition*, p. 40].

58. In his April 2 memo, Mr. Lefkowitz notes that layoffs are sill a possibility. [Bates Document No. 1894].

59. Between March and June 1988 TPF&C had discussed with PECO possible early retirement options. [Exhibit Paquette-4].

60. On May 18, 1988, C.L Fritz, the Vice President of Personnel and Industrial Relations Department of Philadelphia Electric Company, sent a memorandum to R.G. Gilmore, Senior Vice President of Philadelphia Electric Company regarding work force reductions and outlining a recommended program for a pension plan enhancement ("sweetener").

61. In June, 1988, Philadelphia Electric Company was considering an early retirement program to become effective January 1, 1989. [Exhibit TPF&C-15; *Fleischer Deposition*, p. 85]. That program never went into effect.

62. In June, 1988, Mr. Fleischer of TPF&C was asked by Philadelphia Electric Company to provide a cost analysis of the

early retirement program being considered. [*Fleischer Deposition*, pp. 86-87; Exhibit TPF&C-15].

63. On June 6, 1988, Donald Fleischer of TPF&C sent to Mr. McKinsey, the Manager of Personnel and Industrial Relations at Philadelphia Electric Company, a letter enclosing tables concerning the estimated costs for early retirement sweeteners. [Exhibit TPF&C-16; *Fleischer Deposition*, p. 96].

64. On June 10, 1988, Donald Fleischer of TPF&C, sent a letter to John McGinley of PECO providing more detail on the calculations of cost for the potential early retirement sweetener. [Exhibit TPF&C-19; *Fleischer Deposition*, p. 117].

65. On April 13, 1990, Donald Fleischer of TPF&C sent Kenneth Lefkowitz the results of a telephone survey of 145 companies regarding the prevalence of "window plans" (that is, early retirement programs open for a specific period of time). [*Lefkowitz Deposition*, pp. 93-9; Bates Document Nos. 003476-003481].

66. After April 19, 1990, Michael Crommie had an ancillary role in developing the early retirement program. [*Lefkowitz Deposition*, p. 51].

67. On April 23, 1990, Mr. Paquette proposed to the Board of Directors that PECO adopt a plan to reduce costs by $100,000,000, including reducing management salaries and directors fees, advising, contributions and offering early retirement. [*Paquette Deposition*, p. 78].

68. On April 26, 1990, Michael Crommie sent letters to employees who had completed a retirement application and had not yet retired, enclosing the April 19 letter from Mr. Paquette, "to ensure that [they were] aware of an early retirement program that [would be] announced in the latter part of May."

69. On May 4, 1990, Kenneth Lefkowitz sent a memorandum to Mr. Paquette, Mr. McNeill, Mr. Gilmore and Mr. Durham containing various early retirement incentive proposals. [*Paquette Deposition*, p. 105; Bates Document Nos. 1799-1807].

70. On May 25, 1990, the Board of Directors approved Management's proposal to amend the Service Annuity Plan to provide a Special Limited Early Retirement benefit.

71. On May 25, 1990, the Board of Directors also approved the proposal to adopt the Service Completion Plan. This plan provided a one time severance payment to those employees who qualified under the terms of the Service Completion Plan.

72. In order to be eligible to elect to participate in the Special Retirement and Service Completion Plan, one had to have been employed as of the effective date of the Plan, reached 50 years of age or more and completed five or more years of credited service by December 31, 1990.

73. Employees who were eligible could elect one of three alternatives during the window period of July 15, 1990 through September 15, 1990.

74. The alternatives were as follows:

(a) continue with their current career and retirement plans by electing not to take the Special Retirement Plan;

(b) elect the Special Retirement Plan with an improved pension benefit and retire by October 1, 1990; or

(c) elect the Special Retirement Plan and the Service Completion Plan, receiving an improved pension benefit as well as nine month's salary paid in a lump sum. This retirement would occur on or before December 1, 1992, at a time determined by management.

75. Had plaintiffs been employed by PECO when this plan came into effect, plaintiffs would have qualified to elect from the options set forth in the preceding paragraph.

76. Because the plaintiffs were not employees at the time the Plan went into effect, they were not eligible to elect to participate in the Plan.

77. All of the named plaintiffs had retired by April 1, 1990 – before Mr. Paquette announced his intention to recommend that the Board consider approving an early retirement incentive.

78. On May 31, 1990 Mr. Paquette wrote to all employees announcing the decision of the Board of Directors to implement an early retirement program. [*Paquette Deposition*, p. 92]

79. On June 19, 1990, Mr. Fleischer sent a letter to Mr. Lefkowitz regarding the cost implications of the Retirement

Incentive Plan. 3758-3760. This document sets forth cost numbers for the version of the plan that was adopted by the Board of Directors on May 25, 1990.

80. In July of 1990, PECO mailed to employees eligible to participate in the Special Retirement and Service Completion Plan, a packet of information concerning the details of the plan.

81. In 1989 and 1990, Jack McCartney's primary responsibility as Senior Benefits Counselor for Philadelphia Electric Company was working with pension calculations and interviewing retirement applicants. [*McCartney Deposition*, 7/17/91, p. 14].

82. In 1989 and 1990, the steps a PECO employee would undergo in order to retire included the following: notifying his employing officer that he wished to retire; the employing officer would then write a letter to the Vice President notifying him of the employee's desire to retire and the date of retirement; the Vice President would send a letter to the Benefits Division advising of the employee's desire to retire and the date and request that the process be started; the Benefits Division would pull the employee's service record, run a pension calculation for him, contact the employee to schedule a retirement interview; a retirement package would be assembled and a one-on-one interview with the employee and his spouse would be held. [*McCartney Deposition*, 7/17/91, pp. 27-28].

83. The purpose of the retirement interview was to provide the PECO employee with information about his retirement, including the pension amount and options for life insurance. [*McCartney Deposition*, 7/17/91, p. 28].

84. It was part of Mr. McCartney's job to answer questions posed by the PECO employee concerning his retirement Options. [*McCartney Deposition*, 7/17/91, p. 29].

85. The retirement interview generally was scheduled to take place approximately three months before the PECO employee ended his active service with the company; that is, many employees would end active service with the company and take their last period of vacation immediately before their final retirement date. [*McCartney Deposition*, 7/17/91, pp. 31-32].

86. A Philadelphia Electric Company employee who has applied for retirement remains an employee of the company

until his actual retirement date, even if he is on vacation and has ended active service with the company. [*McCartney Deposition*, 7/17/91, p. 32].

87. In 1989 and early 1990, Mr. McCartney was the person within the Human Resources Department, Benefits Division, who conducted the majority of the retirement interviews. [*McCartney Deposition*, 7/17/91, pp. 35-36].

88. During 1989 and early 1990, Jerry Wagner and Jill Lobb also conducted retirement interviews, if Mr. McCartney was unavailable. [*McCartney Deposition*, 7/17/91, p. 35].

89. For at least six months before April 19, 1990, there were tumors among employees of a possible early retirement program. [*McCartney Deposition*, 7/17/91, pp. 43-44].

90. Prior to the April 19 announcement, in response to the questions from employees concerning tumors about potential changes to the pension plan, Mr. McCartney generally would respond: "I have no idea. I heard the same rumors from other people. There is nothing official announced and as far as I know there is nothing that I can tell you." [*McCartney Deposition*, 7/17/91, p. 49].

91. In 1989 and 1990, a Philadelphia Electric Company employee had the right to change their retirement dates at any time prior to retirement date. [*McCartney Deposition*, 7/17/91, p. 34].

92. Mr. Crommie retired on December 31, 1990 under the Special Retirement and Service Completion Plans.

93. Mr. McCartney retired on November 1, 1990 under the Special Retirement and Service Completion plans.

94. Mr. Friderichs retired from Philadelphia Electric Company on August 1, 1991 under the Special Retirement and Service Completion Plans. [*Friderichs Deposition*, p. 8].

95. The number of people who retired from January 1, 1990 through April 1, 1990 was typical of the number of people who usually retire in that time period. [*McCartney Deposition*, 7/17/91, p. 84].

96. Mr. Paquette was aware that the early part of the year was a peak time for retirements. [*Paquette Deposition*, pp. 54-55].

97. At Philadelphia Electric Company, February 1 and March 1 of each year was a peak period of time when people would retire. [*Crommie Deposition*, pp. 78-79].

98. Prior to April 19, 1990, in response to questions regarding an early retirement incentive, Benefits Division staff answered that they had no knowledge of any plan that was being implemented.

99. From 1984 through approximately December, 1988, Jill Lobb was a Senior Benefits Counselor at Philadelphia Electric Company. In December, 1988, her position changed to Benefits Administrator. [*Lobb Deposition*, pp. 14-16].

100. In 1988 through 1990, Jill Lobb conducted retirement interviews on an as-needed basis. [*Lobb Deposition*, pp. 14-17].

101. The Benefits Division routinely receives telephone calls from employees asking whether or not there is any information about potential changes to the pension plan. [*Lobb Deposition*, pp. 27-28].

102. Mrs. Lobb was told by Mr. Crommie to respond very honestly and say "I don't know" to questions she would receive from employees as to whether or not there were any potential changes to the pension plan. [*Lobb Deposition*, p. 28].

103. On August 11, 1986, Philadelphia Electric Company adopted a policy for the "Efficient and Economic Work Force Distribution" as set forth in the memorandum from Charles L. Fritz dated August 11, 1986.

104. Jerry Wagner was a staff assistant in the Benefits Division at Philadelphia Electric Company who conducted some retirement interviews in 1989 and early 1990. Mr. Wagner had been instructed by Mr. Crommie that if an employee asked whether or not there were any potential changes to the pension plan being contemplated, he was to tell them "exactly what the plan called for at that time." Mr. Wagner did not know whether any changes were coming about." [*Wagner Deposition*, pp. 23-27].

105. The "Efficient and Economic Work Force Distribution" policy as set forth in the memorandum dated August 11, 1986 was in effect as an official policy of Philadelphia Electric Company in 1988. [*Beaver Deposition*, p. 110].

The parties in Kurz stipulate to the following facts for purposes of their Motions for Summary Judgment:

1. Philadelphia Electric Company maintains for the benefit of its employees the Service Annuity Plan, an employee pension plan as defined by the Employee Retirement Income Security Act.

2. The Service Annuity Plan is administered by Philadelphia Electric Company.

3. Plaintiffs arc former PECO employees, who retired between February 1, 1987 and June 1, 1987.

4. The Service Annuity Plan was in effect at the time of plaintiffs' retirement.

5. All named plaintiffs currently are receiving pension benefits from the Service Annuity Plan, effective January 1, 1987, which was in effect at the time of their retirements.

6. After plaintiffs retired, the Service Annuity Plan was amended, which was announced by an Official Bulletin on July 2, 1987; the amendment was effective August 1, 1987.

7.Had plaintiffs been employed by PECO when this amendment to the Service Annuity Plan came into effect, plaintiffs would have qualified for the enhanced pension benefits.

8. Defendant J.L. Everett, III ("Everett") was the Chairman of the Board and Chief Executive Officer at PECO from 1982 until his retirement on August 1, 1988.

9. Defendant John H. Austin, Jr. ("Austin") was the President and Chief Operating Officer at PECO from 1982 until his retirement on June 1, 1988.

10. Defendant Charles L. Fritz ("Fritz") was the VicePresident of Personnel and Industrial Relations at PECO from July of 1977 until his retirement on July 1, 1988.

11. In 1987, John McGinley ("McGinley") was the Manager of the Personnel and Industrial Relations Department.

12. In 1987, Ronald Downs ("Downs") was the Manager of the Industrial Relations Department.

13. In 1986 and 1987, Michael Crommie ("Crommie") was the Director of the Employee Service Division at Philadelphia Electric Company.

14. In 1985 through September, 1989, Frederick J. Beaver ("Beaver") was the Administrative Assistant in Personnel and Industrial Relations (which later became known as Human Resources). He reported directly to Michael Crommie. In September, 1989, Beaver was named Supervisor of the Department.

15. In 1986 and 1987, John J. McCartney ("McCartney") was a Staff Assistant in the Benefits Division of the Personnel and Industrial Relations Department at Philadelphia Electric Company. Mr. McCartney conducted the majority of the retirement interviews at that time.

16. In 1987, Jerry Wagner ("Wagner") was a Staff Assistant in the Benefits Division.

17. From 1984 through approximately December, 1988, Jill Lobb ("Lobb") was a Senior Benefits Counselor in the Benefits Division. Her main responsibility was to administer the 401K plan.

18. In 1987, Donald Fleischer ("Fleischer") was Vice President of Towers, Perrin, Forster & Crosby ("TPF&C"), a consulting firm that performed actuary work, among other things, for PECO.

19. In 1986 and 1987, William Murdoch ("Murdoch") was a Vice President at TPF&C.

20. From at least as early as 1977, on an annual or bi-annual basis, PECO participated in surveys that compared the employee pension benefits of companies in the utility industry. [*Fritz Deposition*, pp. 41-42].

21. These surveys assessed and ranked the utility companies' respective pension benefits. [*Fritz Deposition*, pp. 41-44].

22. For many years, this survey was performed by the Public Service Electric and Gas Company ("PSE&G"). Survey results from the 1983 survey were released to PECO in February of 1984. [Bates Document Nos. 116-119].

23. Mr. Beaver was one of the employees in the Benefits Department that would review the comparative studies performed by PSE&G. [*Beaver Deposition*, pp. 12-13].

24. Previously, PECO had amended its pension formula to increase benefits, effective as of January 1, 1982, after a survey

by PSE&G indicated that PECO's pension benefits were low, compared to other companies in the industry.

25. In 1986, after PSE&G had decided to discontinue the survey, PECO assumed the task of compiling the survey, because it provided valuable information. PECO adopted the same format and approximately the same timetables as had previously been in the surveys undertaken by PSE&G. [Bates Document Nos. 072, 104-111].

26. Mr. Beaver was in charge of implementing the first comparative pension benefit study conducted by PECO in 1986 and authored the 1986 Pension Survey Report which was issued May 22, 1987. [*Beaver Deposition*, pp. 21-22,29-30].

27. In approximately February, 1987, Beaver received the data from the other utilities participating in the 1986 pension study. [*Beaver Deposition*, pp. 35-36].

28. As a result of the 1986 pension survey, Mr. Beaver concluded that out of 23 comparison companies, PECO's position was below the midpoint and significantly below the midpoint for all management cases; PECO's position had become fairly noncompetitive. [*Beaver Deposition*, p. 35].

29. The results of the 1986 pension survey increased PECO's activity with regard to evaluation of alternatives to improve the pension plan. [*Beaver Deposition*, p. 59].

30. Over a period of years prior to 1987, there was a growing interest in adjusting the pension plan formula, to improve the benefit. [*Everett Deposition*, p. 21].

31. In 1985, at the request of PECO's Finance Division, TPF&C performed an analysis for a long-term financial planning study, which included a projection of what PECO's pension obligations would be in the future. [*Fleischer Deposition*, pp. 181-182].

32. On March 14, 1985, TPF&C forwarded a copy of the preliminary report of the PECO Service Annuity Plan Funding Study to Neil Lucera in the Financial Division. [Exhibit TPF&C-45]

33. On October 2, 1985, the final version of the TPF&C pension funding study for the Service Annuity Plan was presented to PECO. [*Fleischer Deposition*, pp. 190-191; Exhibit TPF&C-43].

34. On May 1, 1986, Thomas Payne of PECO prepared a memorandum regarding the bi-annual pension survey to be conducted by PECO beginning in November, 1986. [Bates Document No. 103].

35. As of June, 1986, Mr. Crommie informed management of the continuing deterioration of the pension plan and stated that changes might be considered to alleviate that situation. [*Crommie Deposition*, pp. 267-269].

36. On June 23, 1986, Crommie sent a memorandum to Downs entitled 1987 Pension Survey. Downs sent back a handwritten response to a question raised by Crommie. [Bates Document Nos. 178-179].

37. On August 11, 1986, PECO adopted a policy for the "Efficient and Economic Work Force Distribution" as set forth in the memorandum from Charles L. Fritz dated August 11, 1986. [Exhibit Beaver-2].

38. In accordance with PECO's policy for "Efficient and Economic Work Force Distribution," it has been PECO's long-standing corporate policy to avoid layoffs wherever possible. One of the steps to be taken to avoid layoffs according to the PECO policy is "an early retirement offer, or a selective termination allowance [which] will be considered and, if practicable, implemented." [Exhibit Beaver-2].

39. In 1987, Mr. Everett was aware that PECO was "rather low in minimum pension benefits compared to the other companies that [PECO] looked to for comparability." [*Everett Deposition*, pp. 19-20].

40. The Personnel and Industrial Relations Department was responsible for analyzing PECO's benefit programs and recommending improvements, with the assistance of outside consultants. [*Austin Deposition*, p. 29].

41. In 1986 and 1987, Fritz, as the Chairman of the Service Annuity Board, had the responsibility to recommend any changes to the Service Annuity Plan to Everett and Austin. [*Fritz Deposition*, pp. 30-31]

42. In 1987, John McGinley and Ronald Downs participated in evaluating the proposals for changes to the pension plan. [*Fritz Deposition*, p. 73].

43. The consulting firm of Towers, Perrin, Forster & Crosby (TPF&C) is the Service Annuity Plan actuary, and has been so for at least 20 years.

44. One of the services TPF&C has provided to PECO is pricing alternative pension plan improvements. [*Fleischer Deposition*, pp. 193, 248; *Fritz Deposition*, pp. 62-63].

45. The Independent Group Association (IGA) is an employee organization consisting solely of PECO employees. The IGA is not a bargaining unit. Any employee who is not a supervisor can become a member of the IGA after six months of service. [*Fritz Deposition*, pp. 140-141].

46. Plaintiff Donald Kurz was a member of the IGA. [*Kurz Deposition*, p. 33].

47. Plaintiff Donald Kurz was aware that, historically, August 1 was the date that wages and benefits were increased. [*Kurz Deposition*, p. 31].

48. In 1986, the IGA proposed an increase to the pension benefit as part of the August 1, 1986 wage and benefit package. That recommendation was not adopted. [*Fritz Deposition*, p. 47].

49. In 1987, pension benefits continued to be a concern the IGA raised with management. [*Fritz Deposition*, pp. 56, 84-85].

50. On February 27, 1987, Beaver had a telephone conversation with Fleischer at TPF&C with respect to questions concerning a possible pension plan change. [*Fleischer Deposition*, p. 196; Exhibit TPF&C-49].

51. Fritz was aware that in February, 1987, TPF&C was working with PECO to evaluate a formula to change the pension plan. [*Fritz Deposition*, pp. 187-188; Exhibit Fritz-1].

52. On March 3, 1987, TPF&C was evaluating eight alternative proposals for a change to the pension plan for PECO, including one that had been recommended by the IGA [*Fritz Deposition*, pp. 188-189; Exhibit Fritz-2].

53. A March 3, 1987 document contains pricing worksheets prepared by Fleischer for eight different proposed plan improvements under different proposals (including the IGA proposal) for PECO. [*Fleischer Deposition*, pp. 204-209; Exhibit TPF&C-50].

54. On the Wednesday following March 3, 1987, Fleischer held a meeting at PECO to discuss the alternative plan improvement formulas to be considered.

55. On March 5, 1987, Fritz had a preliminary meeting with the IGA Executive Committee to discuss the August 1, 1987 wage and benefit package. At this meeting, proposals for an increase in pension benefits were discussed. [Bates Document No.199; *Fritz Deposition*, p.130]. Fritz remarked generally that the timing was right to make a significant change to the pension plan and that they had been looking at different ways of making a change to the pension, including the proposal given by the IGA in 1986. [Bates Document No.199; *Fritz Deposition*, pp. 127-129].

56. On March 30, 1987, Fleischer and Beaver had meeting regarding a pension plan proposal. Frederick Beaver recorded notes of the meeting on that date. [Bates Document No. 176].

57. On, March 30, 1987, Fleischer requested Pat Kniceley of TPF&C to make calculations showing the impact of Section 415 of the IRS [sic] on the pension benefits that would be paid to Mr. Everett and Mr. Austin by the Service Annuity Plan and Supplemental Pension Plan under various proposals for an improvement to the pension plan. [*Fleischer Deposition*, pp.211-212; Exhibit TPF&C-52].

58. On March 31, 1987, Fleischer had a conversation with Fritz concerning a proposed improvement to the pension. [Exhibit Austin-12.]

59. On April 2, 1987, Fleischer sent to Beaver rough cost estimates of four alternative changes to the Service Annuity Plan. [Exhibit Fritz-6].

60. On April 13, 1987 and April 20, 1987, Fleischer sent letters to Crommie outlining calculations as identified in 57, above. [Exhibits TPF&C 56 and 58].

61. During April and May of 1987, TPF&C continued to "cost out" alternative pension plan formulas, applying several different interest rate assumptions. Changes in the interest rate assumption impacted on the cost to PECO of any proposed plan.

62. On April 14, 1987, Fleischer sent a memorandum to Fritz attaching a draft memorandum for Fritz to consider sending to Mort Rimmerman discussing actuarial assumptions in

light of the proposed changes to the Service Annuity Plan. [Exhibit Fritz-8].

63. Most of the design work on development of alternative formulas was done internally at PECO. [*Murdoch Deposition*, p. 74].

64. On April 15, 1987, J.M. Lange, the President of the Independent Group Association, sent to Fritz a memorandum regarding the August 1, 1987 wage package, which included, among other requests, the IGA's specific proposals for an increase to the percentage calculation for pension benefits. [Bates Document Nos. 210-212; *Fritz Deposition*, p. 137].

65. Fritz met again with the IGA on April 24, 1987, at which time there were further discussions about proposed changes to the pension plan. [Bates Document Nos. 216, 239; *Fritz Deposition*, pp. 142-144].

66. On May 5, 1987, Beaver submitted under Crommie's signature a memorandum to R.N. Downs, the Director of Employee Services regarding the proposed pension plan improvement. [Bates Document No. 073; *Beaver Deposition*, pp. 74-75].

67. By May 5, 1987, Beaver knew that the work he was doing was aimed at an amendment to the pension plan to be effective August 1, 1987, if a change was to take place. [*Beaver Deposition*, p. 73].

68. As of May 5, 1987, Crommie had the charge from management to maintain confidentiality on information that was passed involving potential changes to the pension plan. [*Crommie Deposition*, pp. 249-250].

69. On May 13, 1987, TPF&C calculated the estimated 1987 pension expense for possible plan changes. [Exhibit TPF&C-65A].

70. On May 14, 1987, Fleischer sent Crommie a letter outlining the impact on PECO's annual pension expense should any of the possible changes be made to the Service Annuity Plan. [Exhibit TPF&C-66].

71. A discussion outline prepared by TPF&C dated May 20, 1987 contained proposed benefits improvements under seven alternative formulas. [Exhibit Austin-6; TPF&C-69]. TPF&C

met with PECO to discuss these alternatives. [*Murdoch Deposition*, pp. 62-63].

72. On May 22, 1987, Murdoch sent to Fritz a letter summarizing TPF&C's comments, recommendations and conclusions for improved pension benefits provided under PECO's Service Annuity Plan; six alternative proposals still were being considered. [TPF&C-69D; *Fritz Deposition*, p. 121].

73. On May 22, 1987, the 1986 Pension Survey Report prepared by the Employees Services Division of the PECO Personnel and Industrial Relations Department stated that:

> Based on the information presented in this report, the time for a pension change, as discussed in the meeting of October 2, 1985, has arrived. Working with our consultants, TPF&C, we have examined a number of options, some of which are included in this report, and it is our recommendation that proposal No. 4 be adopted. TPF&C has estimated the annual cost of this improvement to be approximately $9 million.
>
> Normally, changes in the pension formula are announced in July and are effective the following January 1, but the Electric Production Department has recommended an effective date of August 1, 1987 if any change is made and we concur. [Bates Document Nos. 064-071 with quote appearing on Bates Document No. 069].

74. Fritz was receiving cost figures for proposed changes to the wage and benefits package, including the pension plan, before May 22, 1987. [*Fritz Deposition*, pp. 100-101].

75. On May 28, 1987, Fritz sent a memo to Austín and Everett, setting forth the cost of one specific proposal, and requested their approval to proceed further. [Bates Document Nos. 89-90].

76. After receiving the approval from Everett and Austin to proceed, Fritz recommended to the Board of Directors to increase the pension benefits. [*Fritz Deposition*, p. 68].

77. As of June 3, 1987, TPF&C was still costing out alternatives. (TPF&C)

78. Personnel and Industrial Relations prepared a document, entitled "Pension Improvement," "Vacation Improvement," and "Back-Shift Premium Improvement" dated June 16, 1987, for a presentation of the proposed package to the Board of Directors. [Bates Document Nos. 203-209; *Fritz Deposition*, p. 135].

79. Austin and Everett made a recommendation to the Board of Directors, based on the proposal presented by Fritz. Proposed changes were submitted to Everett and Austin about one month to six weeks prior to the Board of Directors meeting. [*Everett Deposition*, p. 18].

80. Fritz was the person who formally went to the Board of Directors to request the change to the pension plan. [*Fritz Deposition*, p. 67].

81. On June 22, 1987, the PECO Board of Directors voted to approve the increase in the pension formula for all participants in the Service Annuity Plan.

82. Until PECO's Board of Directors approved an increase in pension benefits, there was no decision by PECO to amend the pension plan and, therefore, all studies were kept confidential. [*Austin Deposition*, p. 42; *Beaver Deposition*, p. 78].

83. PECO had a policy in 1986 and 1987 not to discuss any proposed plans to amend the pension plan with employees until decision were made by the Board of Directors. [*Everett Deposition*, p. 29; *Austin Deposition*, p. 41].

84. PECO considered that it would be bad management to tell employees about possible changes, because those changes could be modified or ultimately might not be adopted at all. It would have been contrary to company policy to advise employees that a plan, modification or improvement was under consideration. [*Everett Deposition*, p. 30].

85. Once the Board of Directors voted to amend the pension plan, PECO took measures to notify its employees.

86. Immediately following the Board of Directors' vote on June 22, 1987, those employees who were scheduled to retire July 1, 1987, were contacted and given an opportunity to change their election in order to take advantage of the increased benefits. [*Fritz Deposition*, pp. 86-87, 110-112].

87. On July 2, 1987, PECO announced the increase in the pension formula in an official bulletin.

88. On August 1, 1987, the increase in the pension formula became effective. The improvement provides approximately 17.6% increase in the pension for those employees that had 40 years of service and retired at the age of 65. [*Fritz Deposition*, p. 148].

89. Part A of the pension calculation was increased from 1% to 1.2%. Part B of the calculation was increased from .3% to .35%. [*Fritz Deposition*, p. 41].

90. In 1986 and 1987, the steps a PECO employee would undergo in order to retire included the following: notifying his employing officer that he wished to retire; the employing officer would then write a letter to the Vice President notifying him of the employee's desire to retire and the date of retirement; the Vice President would send a letter to the Benefits Division advising of the employee's desire to retire and the date and request that the process be started; the Benefits Division would pull the employee's service record, run a pension calculation for him, contact the employee to schedule a retirement interview; a retirement package would be assembled and a one-on-one interview with the employee and his spouse would be held. [*McCartney Deposition*, 7/17/91, pp. 27-28].

91. The retirement interview was generally scheduled to take place approximately three months before the PECO employee ended his active service with the company; that is, many employees would end active service with the company and take their last period of vacation immediately before their final retirement date. [*McCartney Deposition*, 7/17/91, pp. 31-32].

92. The purpose of the retirement interview was to provide the PECO employee with the information relative to his retirement benefits including pension amount and options for life insurance. [*McCartney Deposition*, 7/17/91, p. 28].

93. A PECO employee who has applied for retirement remains an employee of the company until his actual retirement date, even if he is on vacation and has ended active service with the company. [*McCartney Deposition*, 7/17/91, p. 32].

94. In 1986 and 1987, a PECO employee had the right to revoke his intention to retire at any time prior to his retirement date. [*McCartney Deposition*, 7/17/91, p. 34].

95. According to Crommie, "it was a normal course of events for employees to raise" questions about a possible change to the pension plan with representatives of the Employee Services Division. [*Crommie Deposition*, pp. 204-205].

96. McCartney first became aware that PECO was planning a change to the pension plan which ultimately resulted in the change effective August 1, 1987 when it was officially announced. [*McCartney Deposition*, 12/11/91, pp. 7-9].

97. When asked by an employee about to retire if there were any upcoming changes to the pension plan, McCartney would state that he did not know; he was unaware of any changes coming into effect prior to the official announcement. [*McCartney Deposition*, p. 25].

98. In 1986 and 1987, McCartney was not a member of the IGA. [*McCartney Deposition*, 12/11/91, p. 13].

99. McCartney was unaware that Mr.Fritz was talking to the IGA about changing the pension plan in 1986 or 1987 time period. [*McCartney Deposition*, 12/11/91, p. 21].

100. In the later part of 1986 through the early part of 1987 Fritz had heard that a few questions were being asked by retiring employees concerning the possibilities of any change to the pension plan. [*Fritz Deposition*, pp. 77-78].

101. When answering retiring employees' questions about changes in the pension plan, members of the Benefits Division were instructed to give employees the facts known as of that time, and were instructed not to speculate. [*Fritz Deposition*, p. 77].

102. In the 1986-1987 time frame, Wagner conducted about twenty retirement interviews. [*Wagner Deposition*, p. 15].

103. Wagner did not know of the change to the pension plan effective August 1, 1987 until it was announced throughout the company on or about the 4th of July, 1987. [*Wagner Deposition*, pp. 37-38].

104. Crommie told Wagner that if he was asked questions by employees considering retirement about potential plan changes, that he was to tell them only about the plan as it [was]

right now and not to speculate. [*Wagner Deposition*, pp. 23-24]. Prior to the official announcement, Wagner had no knowledge that any changes in the pension plan were being contemplated. [*Wagner Deposition*, pp.23-24].

105. During 1986-1987, Lobb conducted interviews on an "as needed" basis. [*Lobb Deposition*, p. 48]. She conducted roughly one interview per month. [*Lobb Deposition*, p. 48].

106. According to Lobb, it was not uncommon for someone to ask if there was going to be an improvement to the pension plan or a sweetener at retirement seminars that PECO held in 1986 and 1987. [*Lobb Deposition*, p. 57].

107. The Benefits Division routinely receives telephone calls from employees asking whether or not there is any information about potential changes to the pension plan. [*Lobb Deposition*, pp. 27-28].

108. Mrs. Lobb was told by Mr.Crommie to respond very honestly and say "I don't know" to questions she would receive from employees as to whether or not there were any potential changes to the pension plan. [*Lobb Deposition*, p. 28].

109. Lobb did not know of any potential plan changes until she saw the July 2, 1987 official bulletin. [*Lobb Deposition*, p. 43].

110. The following factors influenced PECO's decision to change the Pension Plan effective August 1, 1987: the IGA had proposed increasing pension benefits in both 1986 and 1987; the pension plan was well funded in 1987; and, compared to other companies in the industry, PECO's pension benefits were low. [*Fritz Deposition*, pp. 66-67].

STANDARD FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Turner v. Schering-Plough Corp.*, 901 F.2d 335,340-41 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); *Williams v. Borough of Chester*, 891 F.2d, 458, 460 (3d Cir. 1989). To establish a genuine issue of material fact, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The burden of demonstrating the absence of genuine issues of material fact is initially on the moving party regardless of which party would have the burden of persuasion at trial. *First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins.*, 824 F.2d 177, 180 (3d Cir. 1987). Following such a showing, the non-moving party must present evidence through affidavits or depositions and admissions on file which comprise of a showing sufficient to establish the existence of every element essential to that party's case. *Celotex*, 477 U.S. at 323. If that evidence is, however, "merely colorable' or is 'not significantly probative,' summary judgment may be granted." *Equimark Commercial Finance Co., v. C.I.T. Financial Corp.*, 812 F.2d 141, 144 (3d Cir. 1987) (quoting, in part, *Anderson*, 477 U.S. at 249-50).

DISCUSSION OF ERISA CLAIMS

Breach of fiduciary duties

Plaintiffs in Fischer and Kurz contend that the defendants violated fiduciary duties under ERISA, 29 U.S.C. § 1104, when they allegedly misrepresented to members of the plaintiff classes that PECO had no current intention to modify its pension benefits, shortly before such modifications were implemented. Plaintiffs contend that fiduciary duties attached to the defendants, as plan administrators, to inform them that a change to the pension plan was in the offing, *before* PECO's decision to amend its pension plan to provide for a sweetened early retirement was finalized. They contend that the PECO defendants' failure to advise them of the coming changes constituted material misrepresentations of their future rights under the plan. They further allege that senior management's instructions to staff level human resources employees, to answer retiring employees inquiries by responding that they were unaware of

any pending changes to the pension plan, also constituted material misrepresentations.

PECO, in response, contends that it had no affirmative duty to inform retirees of proposed changes to the pension plan, prior to a formal corporate decision to implement the changes. More specifically, it avers that ERISA does not require that an employer, when acting in the capacity of a corporate decision maker, inform employees of preliminary plans or discussions concerning a change in pension benefits, until such time as a decision to alter the plan has been finalized.

29 U.S.C 1104 states in part:

> (1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

It has been held that when an employer acts in the capacity of a corporate decision maker, no fiduciary duties attach. *See Trenton v. Scott Paper Co.*, 832 F.2d 806 (3d Cir. 1987), *cert. denied* 485 U.S. 1022 (1988). Where employers wear two hats, as employers and plan administrators, fiduciary status is only assumed when and to the extent that they function in their capacity as plan administrators. *Payonk v. HMW Industries Inc.*, 883 F.2d 221, 225 (3d Cir. 1989), *quoting*, *Amato v. Western Union Intern. Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985).

Nothing in the statutory language of ERISA indicates there is a duty to disclose information on benefits plans before they

take effect. *See Payonk*, 883 F.2d at 221; *Trexel v. E.I. DuPont De Nemours & Co.*, No.85-759 (D. Del. Sept. 9, 1987), aff'd mem., 845 F.2d 1016 (3d Cir. 1988). Courts in other circuits have also held that a duty to disclose information on benefits before they take effect does not exist. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Fine v. Steele*, 699 F.2d 1091, 1094 (11th Cir. 1983); *Fenton Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982).

Plaintiffs acknowledge that the defendants' decisions to amend the respective pension plans were business decisions to which ERISA fiduciary duties did not attach. However, they aver that the PECO defendants' failure to accurately answer prospective retirees' inquiries regarding changes to the plan, after they were under serious consideration, constituted misrepresentation. The plaintiff classes rely for support of their legal theory in these matters on the case of *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). The court in *Berlin* held that when a plan administrator or a plan fiduciary makes a material misrepresentation after serious consideration has been given to offering a plan, that action may constitute a breach of fiduciary duty. *Id.* at 1163.

In *Berlin*, the plaintiff alleged that he officially notified his employer he was going to retire on June 7, 1982, which would have enabled him to recover benefits under the employer's about to be announced special severance plan. The company urged Berlin to change his retirement date to March 31, 1982, allegedly for administrative accounting convenience. This change placed Berlin one day outside the plan's window. *Id.* The district court, focusing solely upon whether the employer was acting as a fiduciary when it undertook to change the plan's benefits, determined that the employer was under no duty to inform the employee of the sweetened plan because the decision to change the plan was a business decision, and not a fiduciary decision.

The Court of Appeals reversed. Rather than focusing upon the character of the decision to change the plan, the Court found that the proper inquiry was whether the employer's actions materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed. *Berlin*, 858

F.2d at 1163. The *Berlin* court defined material misrepresentations to be misleading communications to plan participants regarding plan administration (for example, the employee's eligibility under a plan, or the extent of his benefits under a plan). *Id.* Applying *Berlin* to the facts sub judice, the plaintiffs urge that we too find that the PECO's failure to notify future retirees of the pending changes to the plan, which they contend were under serious consideration, also constituted material misrepresentations violative of § 1104.

PECO, to the contrary, argues that the decision in these matters is controlled by our own Court of Appeal's decision in *Payonk*, supra. In *Payonk*, the plaintiffs withdrew from a defined benefits pension plan shortly before its termination and, therefore, did not share in the distribution of the surplus of the plan. The plaintiffs in *Payonk* contended that the defendants breached their fiduciary duties by failing to disclose information about the upcoming plan termination. *Payonk*, 883 F.2d at 225. The district court held that the termination of the pension plan was made by the defendants in their business capacity; that the defendant had no duty to notify the plaintiffs of the plan termination until the termination date was fixed; and, that the defendants had no duty to disclose preliminary information leading up to the termination of the plan. *Id.* at 224.

The Court of Appeals affirmed. The court compared the facts alleged by Payonk to *Berlin* and found that its defendants made no *Berlin* type misrepresentations to the plaintiffs before the final decision to terminate the plan had been made. The court held that as long as the defendants complied with the notice requirements mandated by ERISA, "an employer's lawful termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA's standard of fiduciary duties." *Id.* at 229.

We agree with PECO that *Payonk* controls the outcome of these cases. In *Berlin* the company, knowing that an amended plan was forthcoming, intentionally told its employees that no definite plans existed for a special pension plan offering, when indeed such a plan had been implemented once and the decision to implement it again had been completed. The company advised the employees, to their detriment, not to delay their

retirement plans. The affirmative misrepresentations of the defendants in *Berlin* were used for the purpose of misleading employees who were delaying their retirements in anticipation of a better severance benefit plan. *Berlin*, 858 F.2d at 1160.

To the contrary, on the record presented we find there is no evidence of affirmative material misrepresentations made by any fiduciary or non-fiduciary employee of PECO. As regards Fischer, the stipulated facts reveal that when asked by an employee about the possibility of an early retirement plan in December of 1989, PECO's CEO Paquette replied that if the company needed to reduce the number of employees, it was possible that they might do it through an early retirement program. (Fischer Joint Stip. ¶21.) The plaintiffs contend that this constituted a material misrepresentation because Paquette had been involved in PECO's ongoing discussions over staffing levels, total wages and other costs; that by December 1989, there was no question but that Paquette was considering an early retirement program to reduce costs.

The Fischer plaintiffs also focus upon the information being disseminated by the retirement counselors, who were told to respond to retiree's questions about potential changes to the plan honestly and say, "I don't know". (Fischer Joint Stip ¶102.) The retirement counselors supplied information with regard to the status of the current pension plan and were told to inform the employees about exactly what the plan called for at that time. (Fischer Joint Stip. ¶104.) Further, the retirement counselors stated that they were not aware of any upcoming changes. (Fischer Joint Stip. ¶104.) Plaintiffs make a two-fold argument that these statements were affirmative misrepresentations: they contend that the counselors engaged in improper conduct; they also contend that senior management engaged in improper conduct in directing the counselors to disseminate the allegedly misleading information.

The decision to recommend that the Board of Directors of PECO approve an early retirement offer was officially made on April 19, 1990. (Fischer Joint Stip. ¶45.) The amendments to the Service Annuity Plan were approved by the Board of Directors on May 25, 1990. (Fischer Joint Stip. ¶90.) We find that under *Berlin* and *Payonk* PECO was under no duty to advise its

pending retirees of possible changes to the pension plan prior to April19, 1990, so long as it made no affirmative material misrepresentations regarding its intentions to alter the plan. This is the key date in the Fischer controversy because before April 19, 1990 PECO's management had made no final decision to implement a change to the pension plan. We find that Paquette's statement in December 1989, that an early retirement program might be implemented, was not, as a matter of law, an affirmative misrepresentation because at the time of his statement no corporate change in policy had been finalized. Indeed, Paquette's statement that an early retirement program might be implemented, accurately represented the current state of affairs at PECO, as portrayed in the stipulated facts.

We also find that the statements of the retirement counselors were not affirmative misrepresentations, necessary for establishing a breach of fiduciary duties under *Berlin*. The Fischer plaintiffs retired from January 1, 1990 to April 1, 1990, before an official recommendation was made to the Board of Directors that an early retirement plan be approved. At the times of the plaintiffs' retirement interviews, defendants had no duty to inform the plaintiffs of potential changes to the plan because the plan amendment decision was not finalized. Further, it has been stipulated that at the time the counselors informed the class members that they did not know of any decisions to alter the pension plan that the counselors were telling the truth. Because PECO did not have an affirmative duty to inform the plaintiffs of potential, unfinalized changes in the plan and because the counselors made no affirmative misrepresentations to the plaintiff class members, we find that PECO is entitled to judgment as a matter of law on this issue.[1]

As regards Kurz, the plaintiff class argues that PECO made affirmative misrepresentations, while the plan changes were

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1. The class also separately contends that PECO senior management engaged in improper conduct in directing the counselors to disseminate allegedly misleading information. We find this argument is untenable in light of the parties' stipulation that the information disseminated by the counselors was truthful at the relevant time.

under serious consideration, by keeping confidential all information regarding the possible changes until the revised plan was approved by the Board of Directors. They recite the stipulation's provisions that PECO participated in surveys that compared their employee pension benefits to other companies in the utilities industry from at least as early as 1977, (Kurz Joint Stip. ¶20), and devoted significant effort to revising the plan beginning in June 1986, as evidence that changes were under serious consideration when the class members made their retirement decisions.

However, the stipulation also recites that the formal proposal to change the pension plan was presented to the PECO Board on June16, 1987 (Kurz Joint Stip. ¶76); that the PECO Board of Directors voted to approve an increase in the pension formula requested by the Vice President of Personnel and Industrial Relations of PECO on June 22, 1987. (Kurz Joint Stip. ¶81). Before that time, discussions regarding potential changes to the plan were kept confidential because of a company policy not to discuss any proposed changes to the pension plan with employees until the Board of Directors had made a decision. (Kurz Joint Stip. ¶83.) PECO considered it bad management to tell employees about possible changes because the changes could be modified or not adopted at all. (Kurz Joint Stip. ¶84)

We find that PECO's policy of keeping potential changes to their pension plan confidential does not constitute an affirmative misrepresentation. We also find that the changes were not "under serious consideration" until they were presented to the corporation's Board, which had the final authority to implement the change. As in Fischer, we find that under *Berlin* and *Payonk*, absent affirmative misrepresentations after the plan had been proposed to the Board, PECO had no affirmative duty to inform the plaintiffs of potential, unfinalized changes in their pension plan. The plaintiffs have failed to produce any evidence that the defendants made affirmative misrepresentations during the relevant time period. Accordingly, we find as a matter of law that PECO's policy of keeping plan changes strictly confidential did not violate the defendants' fiduciary duties under 29 U.S.C. § 1104.

Estoppel

Both plaintiffs' classes also contend that the defendants are liable on the basis of estoppel from denying them increased benefits under the plan. The federal common law claim of estoppel may be applied when an employee relies, to his detriment, on an interpretation of an ambiguous provision in a plan by a representative of that plan. *Kane v. Aetna Life Insurance*, 893 F.2d 1283, 1285 (11th Cir. 1990). To recover under a theory of common-law equitable estoppel, the plaintiffs must show that (1) the party to be estopped misrepresented material facts, (2) the party to be estopped was aware of the true facts, (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the statement would be relied on, (4) the party asserting the estoppel did not know, or could not have known the true facts, and (5) the party asserting the estoppel reasonably relied on the misrepresentation. *National Companies Health Insurance Plan v. St. Joseph's Hospital*, 929 F.2d 1558, 1572 (11th Cir. 1991); *see generally Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 59 (1984).

Given our resolution of the plaintiffs' misrepresentation claims, we also find the plaintiffs can show no factual basis for recovery on their estoppel claims. As we stated, there is no evidence that the defendants made any material misrepresentations to the members of either of the plaintiff classes. The first element needed to maintain an estoppel claim is a material misrepresentation made by the party to be estopped. Accordingly we find that the plaintiffs cannot proceed under a common law estoppel theory.

Discrimination

The plaintiff classes also contend that the defendants engaged in discriminatory conduct in violation of § 510 of ERISA, 29 U.S.C. § 1140. Section 510 states in part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan

> . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

Congress had a specific type of problem in mind when it enacted § 510:

> [This provision was] added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectation of those rights were interfered with by the use of economic sanctions or violent reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation.

S.Rep.No. 93-127, 93d Cong., 2d Sess. The prohibitions in § 510 were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). To pose the threat Congress sought to address when it enacted § 510, an employer's actions must affect the employees' working conditions or procure the employees' dismissal in order to interfere with the employees' attainment of their vested pension rights. *Id.* at 246. "The legislative intent of ERISA was not to ensure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits." *Payonk*, 883 F.2d at 229, citing *Bencivenga v. Eastern Pa. Teamsters*, 763 F.2d 574 (3d Cir. 1985).

A violation of § 510 can arise, for example, from an employer's failure to recall or rehire employees if the selection of employees for recall is made to interfere with the attainment of rights under a plan. *Balten v. Van Ess*, 474 F.Supp.1324 (E.D. Wis. 1976). Discrimination under § 510 can also occur when an employer arbitrarily discharges an employee whose work rights are about to vest, or when an employer makes the workplace unpleasant enough to amount to a constructive discharge. *West*, 621 F.2d at 245; *see Greenblat v. Budd Co.*, 666 F.Supp.735 (E.D. Pa. 1987) (employee stated cause of action when facts

showed that a superior systematically harassed worker who was forced to take inferior benefits). Section § 510 can likewise apply to a suspension, expulsion, disciplinary action, or any other form of discrimination for the purpose of interfering with pension rights, which affects the employment relationship "in some substantial way." *West*, 621 F.2d at 246.

Section 510 is modeled upon Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3); "discrimination" thereunder means adverse treatment of an employee amounting to a "constructive discharge." *Young v. Standard Oil*, 660 F.Supp 587 (S.D. Ind. 1987), aff'd. 849 F.2d 1039 (7th Cir. 1988). Section 510 can apply to a plan amendment where the employer had "discriminatorily modified" the plan, to intentionally benefit, or injure, certain identified employees or a certain group of employees. *Aronson v. Servus Rubber Division*, 730 F.2d 12, 17 (1st Cir. 1984), *cert. denied*, 469 U.S. 1017 (1984). A plan amendment will not violate § 510 if it has a readily apparent business justification based on independently established lines. *Id.* at 16.

As in the context of employment discrimination claims under Title VII, employees alleging discrimination under ERISA bear the burden of making out a prima facie case of discrimination. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir. 1987), citing *McDonnel Douglas Corp.v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed. 668 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981) (refining *McDonnel Douglas*). "To establish a prima facie case under ERISA [29 U.S.C. § 1140], an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Gavalik*, 812 F.2d at 853. "The essential element of proof under § 510 is specific intent to engage in proscribed activity." *Id. See, e.g., Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990) (employee failed to present sufficient evidence that pension interference might have been the motivating factor in his discharge, and therefore did not make out a prima facie case for discrimination).

We find that the plaintiff classes have failed to establish a prima facie case of discrimination under Section 510. As we have found, in neither of these cases did the defendants make affirmative misrepresentations, so as to interfere with the attainment of the plaintiffs' rights under their plans. There is no dispute that the plaintiffs' retirements under the plans were voluntarily and that they are currently receiving pension benefits from the plans. The members of the plaintiff classes were no longer employees of PECO when the subject plan amendments took effect and therefore had no rights under the revised plans. Further, there is no contention that PECO either discharged the plaintiffs or disrupted their employment relationships, so as to constitute a constructive discharge.

The record also discloses that the defendants' decisions to amend the plans had apparent business justifications and were not implemented in order to interfere with the plaintiffs' attainment of their rights. The decision to amend the plan in Fischer was in response to the Public Utility Commission's denial in part of PECO's rate request. (Fischer Joint Stip. ¶45.) PECO's goal was to reduce costs by decreasing its work force. The factors that influenced PECO's decision to change the pension plan in Kurz were: that the IGA had proposed increasing pension benefits in both 1986 and 1987; the pension plan was well funded in 1987; and, compared to other companies in the industry, PECO's pension benefits were below average. (Kurz Joint Stip. ¶110.)

Plaintiffs in Fischer make the additional allegation that PECO engaged in discriminatory conduct by providing some employees with privileged information regarding the early retirement plan. However, we find the Fischer plaintiffs have failed to show that PECO acted with the "specific intent" to interfere with the attainment of their rights under ERISA or their retirement plan.

The record demonstrates that PECO informed its employees on April 19, 1990 that it was going to recommend that the Board approve an early retirement program to included employees who were due to retire on or after May 1, 1990. The plaintiffs' class includes those employees of PECO who retired between January 1 and April 1, 1990. They contend that PECO's

decision to inform those who were to retire on or after May 1, 1990 that the early retirement plan was going to be recommended to the Board, constituted discrimination against the class because the changes to the plan were under serious consideration beginning in December 1989.

However, the defendants had no duty, as a matter or law, to inform the plaintiffs of the proposed early retirement plan until it was recommended to the Board on April 19, 1990. Under ERISA's statutory provisions, PECO was only required to provide notice to its current employees of any "material modification" of the plan "not later than 210 days after the end of the plan year in which the change is adopted to each participant . . ." 29 U.S.C. §§ 1022(a)(1), 1024(b)(1). PECO informed their employees of the upcoming plan three and one half weeks before the plan went into effect. There is nothing in the record to demonstrate that PECO chose the April 19, 1990 date with the specific intent to discriminatorily modify the plan to intentionally benefit or injure certain identified employees or a certain group of employees. Rather, the record reflects that the notice was given on that date, after the course of events which led PECO's senior management to recommend the change reached it natural conclusion. Accordingly, we must conclude that the plaintiffs have failed to demonstrate a prima facia case of discrimination under § 1140.[2]

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2. The plaintiffs have also asserted that a Mr. William Curry was given privileged information in February, 1991 regarding the improved pension plan announced on April 19, 1991. Mr. Curry testified in a deposition on November 19, 1991 that the first time he heard about the early retirement package was when he called Michael Crommie after July 6, 1990. (Def.'s Resp., Exhibit H at 29.) In an affidavit Curry executed on April 16, 1992, however, he avers that he was told by a PECO retirement counselor on or about February 21, 1990 to be patient and wait to retire because "something good is coming later".

Viewing these facts in the light most favorable to the Fischer class, i.e. assuming that Curry had knowledge of the modification before April19, 1990, we find that the plaintiffs have not shown that PECO acted with the specific intent to discriminatorily modify the plan to intentionally benefit Curry or injure the other members of the class. Absent the use of trickery or some form of improper inducement to the plaintiff class to persuade them to retire, while others received inside information to persuade them to remain, we cannot conclude that the mere fact that one counselor made unauthorized statements

CONCLUSION

In conclusion, on the record presented the plaintiff classes have failed to support their claims under ERISA. The plaintiffs have failed to demonstrate that the PECO defendants breached any fiduciary duties to disclose information concerning the amended pension plan before it was under serious consideration by the PECO board of directors. Further, we find that PECO did not engage in discriminatory conduct under ERISA. Accordingly, the motions of the PECO defendants pursuant to Fed. R. Civ. P.56 will be granted.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, et al	:	
V.	:	C.A. NO. 90-8020
PHILADELPHIA ELECTRIC CO., et al.	:	
	:	
DONALD R. KURZ, et al.	:	
V.	:	C.A. NO. 91-2771
PHILADELPHIA ELECTRIC CO., et al.	:	

ORDER

The motion of defendants Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and the Service Annuity Plan of PECO for summary judgment pursuant to Fed. R. Civ. P.56 in Civil Action Number 90-8020 is GRANTED.

The motion of plaintiffs Herbert L. Fischer, et al on their own behalf and as representatives of the class consisting of all those former employees of Philadelphia Electric Company who retired on January, February, March or April 1, 1990, who would have reached age 50 by December 31, 1990 and who

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NOTES *(Continued)*

to a retiree rises to the level of intentional discrimination against the class or constitute action designed to discharge or harass employees in order to keep them from obtaining vested pension rights.

would have completed five or more credited years of service, for summary judgment pursuant to Fed. R. Civ. P.56 in Civil Action Number 90-8020 is DENIED.

Judgment on the merits is ENTERED in favor of defendants Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and the Service Annuity Plan of PECO and against plaintiffs Herbert L. Fischer, et al on their own behalf and as representatives of the class consisting of all those former employees of Philadelphia Electric Company who retired on January, February, March or April 1, 1990, who would have reached age 50 by December 31, 1990 and who would have completed five or more credited years of service.

The motion of defendants Philadelphia Electric Company, the Service Annuity Plan of PECO, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr. for summary judgment pursuant to Fed. R. Civ. P.56 in Civil Action Number 91-2771 is GRANTED.

The motion of plaintiffs Donald R. Kurz, et al on their own behalf and as representatives of the class consisting of all those former employees of PECO who retired from the company from January 1987 through and including June 1, 1987 for summary judgment pursuant to Fed. R. Civ. P.56 in Civil Action Number 91-2771 is DENIED.

Judgment on the merits is entered in favor of defendants Philadelphia Electric Company, the Service Annuity Plan of PECO, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr. and against plaintiffs Donald R. Kurz, et al on their own behalf and as representatives of the class consisting of all those former employees of PECO who retired from the company from January 1987 through and including June 1, 1987.

IT IS SO ORDERED.

CHARLES R. WEINER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

92-1684

Herbert L. Fischer, Floyd L. Adams, James W. Alfreds, John I. Arena, Earl T. Atkinson, William Auve, Thomas F. Beck, William J. Bono, William A. Burwell, Jr., Joseph C. Calabrese, Peter Carfagno, John B. Creighton, Ralph J. DaFermo, Sr., Felix A. DeJoseph, Joseph A. DeVito, John T. Dougherty, John J. Dowling, Anthony Falasca, Eugene Fink, Rita J. Gesualdo, Joseph L. Giorgio, Edwin Haines, Joseph T. Haley, Daniel J. Hefferan, Leo M. Hill, Robert J. Hoopes, Donald J. Hoy, Michael Hrynko, Donald Hughes, Carl M. Hunsicker, Neal Ireland, Walter D. Kraus, Charles E. Lindemuth, Robert F. Mahoney, Anthony D. Marchesani, Robert P.F. McCarron, Robert McCormick, Frank L. Mercadante, John P. Monaghan, David Monzo, John K. Moore, Joseph P. Moran, Mildred Pearl Morgan, Ralph E. Moyer, Herbert E. Mueller, James J. Nugent, Thomas E. Oetzel, Frank W. Persichetti, Sr., Charles W. Plummer, Lewis Raibley, James J. Roddy, John J. Saunders, Louis F. Saunders, Nicholas J. Screnci, Joseph J. Semetti, John Steindl, William F. Thompson, Michael W. Trendler, Francis R. Tunney, Sr., Herbert R. Walters, Richard S. Wilson, John H. Zimmer and Gerald A. Zimmerman,

Appellants,

v.

THE PHILADELPHIA ELECTRIC COMPANY;
Joseph F. Paquette, Jr.;
Michael J. Crommie;
Service Annuity Plan of Philadelphia Electric Company

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and FEINBERG,* *Circuit Judges.*

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* Senior Circuit Judge Feinberg voted only as to panel rehearing.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Stapleton, Hutchinson and Roth would grant rehearing.

BY THE COURT,

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Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

92-1685

DONALD R. KURZ, WILLIAM W. ANDERSON; JAMES W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY PL. MCNAMEE; OLIVER K. MESSENGER; ROBERT E. MILLER; HOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANELY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATERSON; ALFRED B. SHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG,

Appellants,

v.

THE PHILADELPHIA ELECTRIC COMPANY;
SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY;
CHARLES L. FRITZ,
J.L. EVERETT, III;
JOHN H. AUSTIN, JR.

Appellees.

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and FEINBERG,* *Circuit Judges*.

*Senior Circuit Judge Feinberg voted only as to panel rehearing.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Stapleton, Hutchinson and Roth would grant rehearing.

BY THE COURT,

_____

Circuit Judge

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free

flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

§1002. Definitions

* * *

(16)(A) The term "administrator" means –

* * *

(ii) if an administrator is not so designated, the plan sponsor;

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent . . . (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

§1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan –

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in sections 1024(b)(3) and 1025(a) and (c) of this title.

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor

The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary –

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

(c) **Terminal and supplementary reports**

(1) Each administrator of an employee pension benefit plan which is winding up its affairs (without regard to the number of participants remaining in the plan) shall, in accordance with regulations prescribed by the Secretary, file such terminal reports as the Secretary may consider necessary. A copy of such report shall also be filed with the Pension Benefit Guaranty Corporation.

(2) The Secretary may require terminal reports to be filed with regard to any employee welfare benefit plan which is winding up its affairs in accordance with regulations promulgated by the Secretary.

(3) The Secretary may require that a plan described in paragraph (1) or (2) file a supplementary or terminal report with the annual report in the year such plan is terminated and that a copy of such supplementary or terminal report in the case of a plan described in paragraph (1) be also filed with the Pension Benefit Guaranty Corporation.

(d) **Notice of failure to meet minimum funding standards**

(1) If an employer maintaining a plan other than a multiemployer plan fails to make a required installment or other payment required to meet the minimum funding standard under section 1082 of this title to a plan before the 60th day following the due date for such installment or

other payment, the employer shall notify each participant and beneficiary (including an alternated payee as defined in section 1056(D)(3)(K) of this title) of such plan of such failure. Such notice shall be made at such time and in such manner as the Secretary may prescribe.

(2) This subsection shall not apply to any failure if the employer has filed a waiver request under section 1083 of this title with respect to the plan year to which the required installment relates, except that if the waiver request is denied, notice under paragraph (1) shall be provided within 60 days after the date of such denial.

(3) For purposes of this subsection, the terms "required installment" and "due date" have the same meanings given such terms by section 1082(e) of this title.

(e) Notice of transfer of excess pension assets to health benefits accounts

(1) Not later than 60 days before the date of a qualified transfer by an employee pension benefit plan of excess pension assets to a health benefits account, the administrator of the plan shall notify (in such manner as the Secretary may prescribe) each participant and beneficiary under the plan of such transfer. Such notices shall include information with respect to the amount of excess pension assets, the portion to be transferred, the amount of health benefits liabilities expected to be provided with the assets transferred, and the amount of pension benefits of the participant which will be nonforfeitable immediately after the transfer.

(2) Notice to Secretaries, Administrator and employee organizations

(A) In general

Not later than 60 days before the date of any qualified transfer by an employee pension benefit plan of excess pension assets to a health benefits account, the employer maintaining the plan from which the transfer is made shall provide the Secretary, the

Secretary of the Treasury, the administrator, and each employee organization representing participants in the plan a written notice of such transfer. A copy of any such notice shall be available for inspection in the principal office of the administrator.

(B) Information relating to transfer

Such notice shall identify the plan from which the transfer is made, the amount of the transfer, a detailed accounting of assets projected to be held by the plan immediately before and immediately after the transfer, and the current liabilities under the plan at the time of the transfer.

(C) Authority for additional reporting requirements

For purposes of paragraph (1), any term used in such paragraph which is also used in section 420 of Title 26 (as in effect on January 1, 1991) shall have the same meaning as when used in such section.

§1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and

shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

§1023. Annual Reports

(a) Publication and filing

(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include —

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection

(2) If some or all information necessary to enable the administrator to comply with the requirements of this subchapter is maintained by –

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,
(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 1002(16)(B) of this title, such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public account. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the

summary material required under section 1024(b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 1024(a)(2) of this title a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) of this section prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) For purposes of this subchapter, the term "qualified public accountant" means –

(i) a person who is a certified public accountant, certified by a regulatory authority of a State;

(ii) a person who is a licensed public accountant, licensed by a regulatory authority of a State; or

(iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by him for a person who practices in States where there is no certification or licensing procedure for accountants.

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not

required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section –

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this subchapter, the term "enrolled actuary" means an actuary enrolled under subtitle C of subchapter II of this chapter.

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) **Financial statement**

An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan made during the period and the impact of such changes on in the plan made during the period and the impact of such

changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectible and the following information with respect to each loan on such schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectible; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased

(and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is –

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to e reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) **Information to be furnished by administrator**

The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly

or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

(d) **Actuarial statement**

With respect to an employee pension benefit plan (other than (A) a profit sha.ing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and

actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) Information required in regulations of the Pension Benefit Guaranty Corporation with respect to:

(A) the current value of the assets of the plan,

(B) the present value of all nonforfeitable benefits for participants and beneficiaries receiving payments under the plan,

(C) the present value of all nonforfeitable benefits for all other participants and beneficiaries,

(D) the present value of all accrued benefits which are not nonforfeitable (including a separate accounting of such benefits which are benefits commitments, as defined in section 1301(a)(16) of this title), and

(E) the actuarial assumptions and techniques used in determining the values described in subparagraphs (A) through (D).

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary —

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) A statement by the actuary which discloses –

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

but only if, to the best of the actuary's knowledge, such event or trend may require a material increase, in plan costs or required contribution rates.

(11) If the current value of the assets of the plan is less than 70 percent of the current liability under the plan (within the meaning of section 1082(d)(7) of this title), the percentage which such value is of such liability.

(12) Such other information regarding the plan as the Secretary may by regulation require.

(13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

(e) Statement from insurance company, insurance service or other similar organizations which sell or guarantee plan benefits

If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating –

(1) the premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization and the approximate number of persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups its serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organization and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

§1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary –

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require.

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modification or changes is adopted or occurs, as the case may be. The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, up request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

(2)(A) With respect to annual reports required to be filed with the Secretary under this part, he may by regulation prescribe simplified annual reports for any pension plan which covers less than 100 Participants.

(B) Nothing contained in this paragraph shall preclude the Secretary from requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this subchapter nor shall the Secretary be precluded from revoking provisions for simplified reports for any such plan if he finds it necessary to do so in order to carry out the objectives of this subchapter.

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this subchapter, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans.

(4) The Secretary may reject any filing under this section – .

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 1023(a)(3)(A) or section 1023(a)(4)(B) of this title.

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions –

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

(b) **Publication of summary plan description and annual report to participants and beneficiaries of plan**

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title –

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated

available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material (including the percentage determined under section 1023(d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) Statement of rights

The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this subchapter.

29 U.S.C. §1025. Reporting of participant's benefit rights

(a) Statement furnished by administrator to participants and beneficiaries

Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so

requests in writing, a statement indicating, on the basis of the latest available information –

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) One-per-year limit on reports

In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) of this section during any one 12 month period.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement.

Each administrator required to register under section 6057 of Title 26 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a)(2) of Title 26. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

(d) Plans to which more than one unaffiliated employer is required to contribute; regulations

Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.

§1054. Benefit accrual requirements

* * *

(h) Notice of significant reduction in benefit accruals

(1) A plan described in paragraph (2) may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment

and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to –

(A) each participant in the plan,

(B) each beneficiary who is an alternate payee (within the meaning of section 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056(d)(3)(B)(i) of this title), and

(C) each employee organization representing participants in the plan,

except that such notice shall instead be provided to a person designated, in writing, to receive such notice on behalf of any person referred to in subparagraph (A) (B), or (C).

(2) A plan is described in this paragraph if such plan is

(A) a defined benefit plan, or

(B) an individual account plan which is subject to the funding standards of section 302.

§1104. Fiduciary Duties

(a) **Prudent Man Standard of Care**

(1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

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§1108. Exemptions from prohibited transactions

* * *

(c) Fiduciary benefits and compensation not prohibited by Section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from –

* * *

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

§1341. Termination of single-employer plans

(a) General rules governing single-employer plan termination

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a

standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of e corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if –

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parts required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure

(A) Notice to corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth –

(i) certification by an enrolled actuary –

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that –

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete. Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) or Title 26.

(B) Notice to participants and beneficiaries of benefit commitments

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan –

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if –

(I) it has reason to believe that any requirement of subsection (a)(2) of this section or subparagraph (A) or (B) has not been met, or

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously

agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if –

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall –

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan.

(B) Certification to corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan

under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed kin accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

(4) Continuing Authority

Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination date of a plan terminated in a standard termination under this subsection, of its authority under section 1303 of this title with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corporation's obligations under section 1322 of this title.

(c) Distress termination of single-employer plans

(1) In general

A single-employer plan may terminate under a distress termination only if-

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraph (B) of paragraph (2) are met.

(2) Termination requirements

(A) Information submitted to corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) unless the corporation determines the information is not necessary for purposes of paragraph (3)(A) or section 1362 of this title, certification by an enrolled actuary of-

(I) the amount (as of the proposed termination date and, if applicable, the proposed distribution date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such dates) of the benefit liabilities under the plan,

(III) whether the plan is sufficient for benefit liabilities as of such dates,

(IV) the actuarial present value (as of such dates) of benefits under the plan guaranteed under section 1322 of this title, and

(V) whether the plan is sufficient for guaranteed benefits as of such dates;

(iii) in any case in which the plan is not sufficient for benefit liabilities as of such date—

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation to be able to make payments to participants and beneficiaries as required under section 1322(c) of this title; and

(iv) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certifications under clause (ii) is accurate and complete, and

(II) the information provided to the corporation under clauses (i) and (iii) is accurate and complete. Clause (ii) and clause (iv)(I) shall not apply to a plan described in section 412(i) of Title 26.

(B) Determination by corporation of necessary distress criteria

Upon receipt of the notice of intent to terminate required under subsection (a)(2) of this section and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following causes:

(i) Liquidation in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed or has had filed against such person, as of the proposed termination date, a petition seeking liquidation in a case under Title 11, or under any similar law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under Title 11, or under any similar law or State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed,

(III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) **Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce**

The requirements of this clause are met by a person if such person demonstrates to the satisfaction of the corporation that—

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under

all single-employer pans of which such person is a contributing sponsor.

(C) Notification of determinations by corporation

The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(3) Termination procedure

(A) Determinations by corporation relating to plans sufficiency for guaranteed benefits and for benefit liabilities

If the corporation determines that the requirements for a distress termination set forth in paragraphs (1) and (2) are met, the corporation shall—

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit liabilities (as of the termination date or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination

After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) **Cases of sufficiency for benefit liabilities**

In any case in which the corporation determines that the plan is sufficient for benefit liabilities, the plan administrator shall proceed to distribute the plan's assets, and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3) of this section, and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) **Cases of sufficient for guaranteed benefits without a finding of sufficiency for benefit liabilities**

In any case in which the corporation determines that he plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit liabilities on the basis of the information made available to it, the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3) of this section, make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan.

(iii) **Cases without any finding of sufficiency**

In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it, the corporation shall commence proceedings in accordance which section 1342 of this title.

(C) Finding after authorized commencement of termination that plan is unable to pay benefits

(i) Finding with respect to benefit liabilities which are not guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit liabilities which are not benefits guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter.

(ii) Finding with respect to guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 1342 of this section.

(D) Administration of plan during interim period

(i) In general

The plan administrator shall—

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsection (a)(2) of this section and ending on the date on which the plan administrator receives notification form the

corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation makes a finding under subparagraph (C)(ii).

(ii) **Requirements**

The requirements of this clause are met by the plan administrator if the plan administrator-

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination under this subsection,

(II) pays benefits attributable to employer contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer, and

(IV) continues to pay all benefit liabilities under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 1322 of this title or to which assets are required to be allocated under section 1344 of this title.

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) **Sufficiency**

(1) **Sufficiency for benefit liabilities**

For purposes of this section –

A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan.

(2) **Sufficiency for guaranteed benefits**

A single-employer plan is sufficient for guaranteed benefits if there is not amount of unfunded guaranteed benefits under the plan

(e) **Limitation on conversion of defined benefit plan to defined contribution plan**

The adoption of an amendment to a plan which causes the plan to become a plan described in section 1321(b)(1) of this title constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) of this section or distress termination under subsection (c) of this section.

No. 93-631

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE PHILADELPHIA ELECTRIC COMPANY, et al.
Petitioners

v.

HERBERT L. FISCHER, et al.,
Respondents

THE PHILADELPHIA ELECTRIC COMPANY, et al.
Petitioners

v.

DONALD R. KURZ, et al.,
Respondents

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Third Circuit Court of Appeals correctly hold that: (1) Philadelphia Electric Company, the Plan Administrator of the Service Annuity Pension Plan, has a fiduciary duty under ERISA to speak truthfully when answering questions posed by plan participants about possible changes to the pension plan which are under serious consideration; and that (2) there are genuine issues of material fact in dispute regarding whether affirmative misrepresentations were made to the plaintiffs about possible changes to the Service Annuity Pension Plan at a time when PECo was seriously considering such changes, thereby precluding summary judgment?

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STATEMENT OF THE CASE

Petitioners, Philadelphia Electric Company (hereinafter "PECo"), et al. have requested this Court to review two separate cases under ERISA. In both of these cases, respondents claim that PECo breached its fiduciary duties under ERISA as a plan administrator when it made material misrepresentations about possible changes to the pension plan at a time when such changes were under serious consideration.[1]

As framed by the Petitioners in the Statement of the Case, the specific issue PECo presents to this Court contains an obvious omission; that is, the issue decided by the Third Circuit Court of Appeals concerned whether fiduciary duties under ERISA are applicable to the communications of not just an employer, as stated by Petitioners, but an employer who is also a plan administrator. This is significant because, as the Third Circuit correctly determined, "the fiduciary obligations owed to the participants were owed by PECo as plan administrator." [Fischer v. Philadelphia Electric Co., 994 F.2d 130, 135 (3d Cir. 1993)]. The issue as framed by the Petitioners also contains a flagrant misstatement; that is, the respondents did not concede that the miscommunications at issue concerned matters which are business in nature and which do not involve the administration of the Plan. To the contrary, respondents have always maintained that the misrepresentations concerned important information about their pension benefits which was necessary for them to make an informed decision regarding retirement.

Furthermore, it is patently untrue that the parties in each of the cases have agreed that the facts are not in dispute. True, joint stipulations of fact were filed with the District Court on order of the Court. However, there were numerous other facts to which the parties could not stipulate and, therefore, the parties agreed that they were not limited to the Joint Stipulation of Facts but that references

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[1] It should be noted that the respondents also have asserted claims of discrimination and estoppel. The Petitioner has not sought review of the discrimination or estoppel claims.

could also be made to facts in depositions and documents. Indeed, respondents offered to both the District Court and the Court of Appeals Proposed Findings of Facts which include many of these disputed facts. Finally, the issue presented by the Petitioners is not of the caliber requiring intervention by the United States Supreme Court.

C. Factual Background

1. The Fischer Case

On April 19, 1990, Joseph Paquette, the President, Chief Executive Officer and Chairman of the Board of PECo announced a decision to recommend that the Board of Directors amend PECo's Service Annuity Plan to implement an early retirement incentive program. This lucrative program, enacted on May 25, 1990, provides a lifetime of enhanced pension benefits for employees who elected this option. Had respondents still been employed by PECo when this program came into effect, they would have been eligible to participate in the plan. Unfortunately, they retired before this announcement because they were led to believe that PECo was not considering plans to offer a retirement incentive program in the near future.

That is, PECo had a standard procedure for processing retirement applications which required the Department of Human Resources to conduct a retirement interview with the potential retiree in order to provide information about benefits. During late 1989 and early 1990, the majority of these retirement interviews were conducted by John McCartney, the Senior Benefits Counselor. Mr. McCartney candidly testified during his deposition that most of the employees who were going to retire from January to April, 1990 questioned whether there were going to be any changes to the pension plan. Rumors to this effect had been circulating throughout the company, thereby prompting the employees' questions which in turn caused Mr. McCartney to ask his supervisor, Michael Crommie, the Director of the Benefits Division of the Human Resources Department, on two or three occasions if he was aware of any changes to the pension plan being contemplated. Mr. McCartney knew that prospective retirees were asking whether there

were plans to change the pension so they could defer their retirement in order to take advantage of any amendments to the pension plan and, therefore, he saw it as his responsibility to give as accurate and as complete as possible an answer to their questions. Mr. Crommie admits that during 1989 his staff advised him that they were getting an increasing number of questions from employees about a retirement incentive. He also admits that he and his staff:

> "went over and made sure that our answers were consistent in that we had no knowledge of any plan - an early retirement plan that was being generated, studied, implemented, so that was the consistent answer that we and I (Mr. Crommie) instructed the staff to give to that question of whether or not there was a sweetener in the wind, whether the company was working on a sweetener." [Crommie Deposition, p. 84].

Unfortunately, Mr. Crommie did not see it as part of his responsibility, in order to assure that his answers were complete, truthful and accurate, to obtain information from other sources; his reasoning – "if management wanted me to know anything, they would have instructed me so." [Crommie Deposition, pp. 85-86]. Thus, he directed his subordinates in the Benefits Division to consistently claim lack of knowledge about the status of a retirement incentive program without, by his own admission, first ascertaining the relevant facts from those managers and officers at PECo who would be in a position to know this information. As a result, respondents, all loyal, trusting and long-term employees, were misled to believe there were no plans for an early retirement package. Plaintiffs' Answers to Defendants' Interrogatories documenting this point were relied upon by the Court of Appeals as providing sufficient evidence of misrepresentation to preclude summary judgment in favor of PECo.

Contrary to the representations made to respondents, plans to offer an early retirement program as a means of reducing the bloated PECo work force had been initiated two years earlier. In March, 1988, management personnel in the Employees Services Division of PECo recommended amending the PECo Service

Annuity Plan to offer an early retirement sweetener as a means of achieving a reduction in the work force. From March through June, 1988, Towers, Perrin, Forster & Crosby (hereinafter "TPF&C") was consulted by PECo to address certain options for an early retirement program. TPF&C worked closely with senior management personnel at PECo, including defendant, Michael Crommie, in developing various early retirement options and in June, 1988 presented a detailed calculation of costs for open window programs, including a program to be effective January through July 1989, which was remarkably (and curiously) similar to that which is the subject of this lawsuit.

These proposals were being explored in 1988 by senior management in part because of the fear that PECo was headed for bad financial times, including the possibility that the Pennsylvania Public Utility Commission (PUC) would not grant the rate increase PECo was looking for in the future. However, there was an "ongoing concern" that if PECo had a voluntary early retirement "sweetener" and incurred additional costs, the PUC would not allow PECo to recover the additional costs in the rate base. Apparently, this concern resulted in tabling the proposal for a retirement incentive until after the PUC rate increase request was decided.

In July, 1989, PECo filed the request with the PUC for a $549 million rate increase. Given that Mr. Paquette believed that the financial future of PECo hinged on the rate decision, it is not surprising that he immediately implemented plans to reduce costs in the event that PECo did not receive the full rate increase. In July, 1989, he discussed with Mr. Friderichs, the Manager of Corporate Planning and Analysis, the need for a strategic plan for the financial future of PECo, and in early August, 1989, requested him to identify outside consultants to assist in such efforts.

When PECo learned in October, 1989 that the PUC staff had recommended that PECo receive less than half the rate increase requested, the urgency to prepare for the eventuality of not getting its full rate increase was heightened. Therefore, in November, 1989, PECo hired McKinsey and Company, a consulting firm, to assist in the development of a new corporate strategy. One of the aspects which McKinsey studied was staff reduction. The efforts

to develop an early retirement program escalated in March, 1990, after the Administrative Law Judges issued an interim decision on PECo's rate increase application, recommending that it receive only 21% of the full amount requested. PECo management was well aware that the PUC's final decision is generally very close to the ALJ's report. Therefore, Kenneth Lefkowitz, the Manager of Compensation and Benefits Division, began outlining options for reducing the work force. On March 12, 1990, he contacted TPF&C to discuss options and, in particular, advised that PECo wanted to consider an early retirement sweetener. In response to his requests, Mr. Murdoch, a Vice President of TPF&C, sent a confidential memorandum to Mr. Lefkowitz on March 28, 1990 outlining three alternative "open window" programs for a proposed staff reduction, the first of which was the same early retirement program which had been initially considered in June, 1988!

In April, 1990, PECo senior management continued their concerted effort, with the help of TPF&C and McKinsey, to meet Mr. Paquette's goal of reducing costs and looked at early retirement incentive options as the method for reducing the work force to achieve that goal. The various studies, meetings, and reports generated during these planning efforts ultimately resulted in the announcement made by Mr. Paquette on April 19, 1990 to recommend a retirement incentive package.

Clearly, affirmative steps were being taken by PECo from at least July, 1989, to meet Mr. Paquette's goal of reducing costs and looking at methods of reducing the work force including early retirement options to achieve that goal. It is equally clear that PECo management made a conscious decision not to share that information with the employee population. Mr. Paquette admitted at his deposition that even if Mr. Lefkowitz was considering an early retirement program in March, 1990, he was not authorized to inform employees of that fact. Mr. Lefkowitz acted accordingly and, as he confirmed at his deposition, did not consider letting prospective retirees know in March, 1990, about the possibility that PECo might implement an early retirement program. Indeed, Mr. Lefkowitz intentionally hand wrote his March 28, 1990 "reduction in force" memorandum instead of having it typed in order to maintain confidentiality. The management personnel involved with

the McKinsey study were likewise instructed that their activities were to remain confidential. Mr. Friderichs, who was in charge of coordinating the McKinsey study, acknowledged that it had been the common practice at PECo to maintain confidentiality of discussions about possible proposed or contemplated benefit changes.

Unequivocally, senior management's goal of maintaining confidentiality about their activities, coupled with Mr. Crommie's conscious decision not to seek accurate information from his superiors, had the predictable impact of leaving the retirement counselors in the dark and the prospective retirees without accurate answers to their questions about possible changes to the pension plan.

2. The Kurz Case

On July 2, 1987, PECo issued an official bulletin to their employees announcing an improved minimum formula for the calculation of pension benefits to be effective August 1, 1987. The respondents had retired from January 1 through June 1, 1987 and, therefore, were denied eligibility for these enhanced benefits. The pension benefits they received were calculated under the old formula which was long recognized by PECo as being lower than average for the utility industry.

Initial discussions regarding amendment of the pension plan began at least two years before its official adoption. Significantly, by the time respondents were making their retirement decisions, PECo had already anticipated the need to make improvements to the pension plan and, in fact, had set a target date by which to accomplish this goal. PECo, however, made a conscious decision not to disclose this information to prospective retirees before the official announcement of the amendment on July 2, 1987. As a result, the respondents were falsely told that there were no plans to amend the pension plan in response to questions posed to their retirement counselors and/or supervisors at a time when they were making important decisions about the timing of their retirement.

The extensive history of PECo's planning efforts in developing the amendment to the Service Annuity Plan, summarized

as follows, proves that "serious consideration" was being given to a change in the Service Annuity Plan to enhance pension benefits since at least June, 1986 and possibly earlier:

(a) In 1985, at the request of PECO's Finance Division, TPF&C, the actuarial consultant for PECO, was asked to perform an analysis for a long-term financial planning study, including a projection of PECO's future pension obligations.

(b) In the March, 1985 preliminary study issued by TPF&C, an increase from .30% to .35% of the multiplier used to calculate Part B pension benefits was identified at the request of PECO as a projected improvement to be implemented January 1, 1988.

(c) This projected pension improvement was part of the improvement which was actually adopted August 1, 1987.

(d) Over a period of years before 1987 there was growing interest at PECO in adjusting the pension plan formula to improve benefits.

(e) In 1985 and 1986, senior management in the Personnel and Industrial Relations Department at PECO were discussing alternative methods for improving pension benefits to bring PECO into a more competitive position.

(f) In June, 1986 Mr. Crommie, the Director of PECO's Benefits Division, informed management of the continuing deterioration of the pension plan and stated that changes might be considered to alleviate that situation.

(g) On June 23, 1986, Mr. Ronald Downs, in response to a question posed by Mr. Crommie, acknowledged that "some input from TPF&C will be required with regard to our recommended modifications to plan!" This confirms that in mid-1986, PECO had already anticipated making recommendations to improve the pension

plan based on the 1986 industry-wide pension survey it was conducting.

(h) On February 27, 1987, after reviewing the pension survey data collected from the industry-wide study conducted by PECO, Mr. Beaver, PECO's Administrative Assistant in the Benefits Division, called Mr. Fleischer at TPF&C and requested cost calculations for a pension formula that represented a change to the pension plan.

(i) By March 3, 1987, TPF&C was already evaluating alternative proposals for a change to the pension plan.

(j) On March 5, 1987, Mr. Fritz attended a meeting of the IGA Executive Committee during which he commented that the timing was right to make a significant change to the pension plan and that PECO had already been looking at different ways of doing so.

(k) By the end of March, 1987, TPF&C calculated benefit projections for all PECO officers under the Service Annuity Plan as it existed and under four different proposals for improvement to the plan.

(l) On April 2, 1987, Mr. Fleischer of TPF&C sent Mr. Beaver rough cost estimates of four alternative changes to the Service Annuity Plan.

(m) By early April, 1987, Mr. Crommie was aware that PECO management had requested information from Mr. Beaver about various pension plan formulas and participated in conversations with TPF&C regarding calculations for PECO officers under various proposals.

(n) On April 14, 1987, Mr. Fleischer of TPF&C sent a draft memorandum to Mr. Fritz for presentation to his superiors discussing actuarial assumptions in light of proposed changes to the Service Annuity Plan.

(o) At the April 24, 1987 IGA Executive Committee Meeting, Mr. Fritz confirmed again that it was time to make a change in the pension plan, that PECO had looked into a number of pension calculation formulas, that he had already discussed the formulas with Mr. Everett and Mr. Austin, and that although not cast in concrete, the pension improvement package would be announced on July 2, 1987.

(p) On May 5, 1987, Mr. Beaver prepared a plan to announce the improved pension plan after passage by the Board of Directors; the memo he sent to this effect emphasized the need to maintain "utmost confidentiality" prior to approval by the Board of Directors.

(q) On May 13, 1987, Mr. Beaver and Mr. McGinley of PECO advised Mr. Fleischer of TPF&C that there had at least been some "informal commitment" that an improvement to the pension plan was coming.

(r) On May 14, 1987, Michael Crommie received a letter from Mr. Fleischer at TPF&C outlining annual pension expense should any of the possible changes to the Service Annuity Plan be made.

(s) On May 27, 1987, the Employee Services Division of PECO recommended that PECO adopt a specific proposed improvement to the pension plan to be effective August 1, 1987, specifically noting that the time for a pension change as discussed in the meeting of October 2, 1985 had arrived. This confirms that PECO had anticipated this improvement to the pension formula at least two years before plaintiffs' retirement!

(t) On May 28, 1987, Mr. Fritz received the approval of Mr. Everett and Mr. Austin to recommend a proposal to the Board of Directors to increase pension benefits.

The facts established of record in this case likewise document that PECo intentionally withheld information regarding its planning efforts from the respondents. Indeed, the evidence of the petitioners' conduct was so iron clad that the District Court acknowledged that PECO had an actual policy of keeping potential changes to the pension plan confidential before being voted on by the Board of Directors. Respondents presented glaring evidence of the nature and extent of the misrepresentations made by PECo. For example, defendant, Charles L. Fritz, PECO's Vice President of Personnel and Industrial Relations, claims that he thought it was important that potential retirees at least be told, in answer to questions regarding this matter, that the IGA (an employee organization) was in fact asking for improvements to the pension plan because:

> "I think it would be wrong for the interviewer to say that nothing was being discussed or looked into. I think it would have been dishonest, and we certainly try to be completely above board in this area." [Fritz Deposition, pps. 160-161].

Yet, in March, 1987, after he had specifically told the IGA that 1987 was the right time to make such a change to the pension plan, Mr. Fritz intentionally did not inform Mr. Crommie, supervisor of the retirement interviewers, of this fact, claiming that "he didn't need to know many of these things at that time...." [Fritz Deposition, p. 84]. Mr. Fritz made it impossible for his own policy of informing prospective retirees of the IGA's request for improved pension benefits to be carried out since he admittedly withheld this information. As a result, respondent, Donald Kurz, whose retirement interview was on March 6, 1987 – the day after Mr. Fritz's meeting with the IGA Executive Committee – was only told the following in response to his questions posed to Mr. McCartney regarding any "sweeteners" and whether he was hurting himself by leaving before August 1, 1987:

> "[McCartney's] response to me was, as far as I know, no, there is nothing coming out that would be beneficial to you. He said if anything was coming out, our department would be the first one to know about it and he said, if he knew something, I would tell you, not what it was, but I would tell you hang in for another two months until August 1 for your own benefit." [Kurz Deposition, p. 26].

Mr. Kurz retired on June 1, 1987 without the benefit of the information Vice President Fritz said he was entitled to receive and, as a result, was deprived of the substantial increase in pension benefits provided to those employees who retired on or after August 1, 1987.

This and many other examples which were cited to the court below confirm that not only did the respondents question whether or not any improvements to the pension plan were forthcoming, but also that they were routinely told that there were no such plans. Given the extensive history of planning for the enhanced pension formula, which began as early as 1985, and the continual activity aimed at implementing this change by the target date originally selected in 1985, there can be no dispute that "serious consideration" was being given to such a change to the pension plan at the relevant time period when the respondents were asking pertinent questions and basing their plans on the responses received from the people they were depending upon for accurate information. Similarly, given the admitted practice by PECO of not disclosing information regarding changes to the pension plan before the Board of Directors makes a decision, and the overwhelming testimony concerning the efforts to maintain confidentiality about the plans for such a change, it cannot be disputed that affirmative misrepresentations were communicated to the respondents in response to their questions regarding this matter.

D. The Proceedings Below

Despite the extensive evidence in both cases, as outlined above, the District Court in each case decided that there were no material misrepresentations made to respondents because PECo had not given "serious consideration" to changing the pension plan until such plans were officially announced. The District Court granted summary judgment in favor of the petitioners. The Court of Appeals relied upon convincing factual evidence to conclude that the District Court's characterization of the record as lacking evidence of material misrepresentations by PECo was incorrect and therefore reversed and remanded the case for trial. In so deciding, the Court rejected PECo's explanation that since the company had never told the benefits counselors that it was considering changes to the pension plan, then the counselors' representations to the respondents, that no such plans were being contemplated, were truthful, holding:

> "This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a chinese wall around those employees on whom plan participants reasonably rely for important information and guidance about retirement." [*Petitioners' Appendix, A-10*].

The petitioners filed a Petition for Rehearing and Rehearing En Banc making many of the same arguments as presented to this Court. Nine judges out of 12 denied the rehearing.

SUMMARY OF THE ARGUMENT

It is of utmost significance that the Third Circuit determined in both the Fischer and Kurz cases that questions of material fact remained unanswered, thereby precluding summary judgment and necessitating remand to the District Court for resolution. [*Appendix to Petition, A-11 and A-19-20*]. Given the outstanding issues of material fact yet to be decided and, consequently, the lack of finality in this case, it is submitted that review by the United States Supreme Court is premature.

More importantly, the issues decided by the Third Circuit in these cases are not of the caliber requiring review by the United States Supreme Court for the following reasons:

1. The Third Circuit correctly defined a plan administrator's fiduciary duties under ERISA, specifically holding: "A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must be speak truthfully." [*Petitioners' Appendix, A-10*];

2. This holding of the Third Circuit effectuates the purpose for which ERISA was enacted, as defined by the Supreme Court. That is, it enforces strict fiduciary standards of care and promotes the best interests of participants and beneficiaries;

3. The decision of the Third Circuit is in accord with the decisions of other circuits who have addressed the specific issues in question. Those cases referred to by the petitioner as being in conflict with the Third Circuit analysis are factually distinguishable, and, therefore, legally irrelevant to the determination of whether certiorari is warranted.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Petitioners' Writ for Certiorari is Premature.

The Third Circuit remanded both the Fischer and Kurz cases to the District Court for resolution of the factual issue of whether the particular communications PECo made to the respondents constituted affirmative misrepresentations. This determination, according to the Court, requires an analysis of whether the affirmative misrepresentations were material; in the present context, the Court concluded a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. [*Petitioners' Appendix, A-11*]. It would also include inquiry into the seriousness with which a particular change to an employee pension plan was being considered at the time the misrepresentations were made. The Court concluded that in each case there remained open questions of how seriously PECo was considering changes to the pension plan at the time when the respondents made various inquiries that elicited the misrepresentations. While the petitioners repeatedly and erroneously argues that the parties in each case agreed that the facts are not in dispute, the Court's conclusion that material facts are in issue is easily documented. Respondents claim in both the Fischer and Kurz cases that PECo initiated steps to implement changes to the pension plan at least two years before the official announcements and continued with increasing seriousness to consider such plans, as demonstrated by the numerous meetings, the hiring of outside actuarial consultant and the various studies to, in the Fischer case, reduce the work force and in the Kurz case, to improve pension benefits to meet industry standards. Petitioner, on the other hand, vigorously argued in both the District Court and the Third Circuit, that serious consideration had not been given to implement changes to the pension plan until, at the very earliest, management affirmatively decided to make such a recommendation to the Board of Directors. As is evident from the Third Circuit's opinion, the determination of when PECo was seriously considering changes to the pension plan is a key factual issue in both cases and is clearly in dispute among the parties.

A factual determination of these important issues is essential to place the effect and impact of the Third Circuit's opinion upon the fiduciary duties of a plan administrator under ERISA in perspective. At this stage of the proceedings, with these factual issues unresolved, it is unclear how the mandate of the Third Circuit regarding a plan administrator's responsibilities will be applied to PECo under the circumstances of these cases. As such, it is premature for the United States Supreme Court to grant certiorari to review the issue presented by the petitioner. See, e.g., Toilet Goods Association v. Gardner, 387 U.S. 158, 163-164, 87 S. Ct. 1520, 18 L. Ed.2d 697 (1967) [a challenge to agency regulations where it is not clear whether, or in what manner, the regulations will be applied to the claimant is not ripe for adjudication].

II. There Are No Special or Important Reasons which Would Warrant this Court to Grant Certiorari.

A. The Decisions of the Third Circuit Correctly Define the Plan Administrator's Fiduciary Duties to Plan Participants under ERISA.

Consistent with the controlling case law of Payonk v. HMW. Industries, Inc., 883 F.2d 221, 225 (3d Cir. 1989), the Third Circuit in the Fischer and Kurz cases held that a plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. As articulated by Judge Feinberg, "Put simply, when a plan administrator speaks, it must speak truthfully." Fischer v. Philadelphia Electric Co., 944 F.2d 130, 135 (3d Cir. 1993). There is nothing so novel or exceptional about this decision which warrants such extraordinary relief as review by the United States Supreme Court. Indeed, certiorari was recently denied by this Honorable Court in a case in which the issue presented was virtually identical to the question presented in the cases sub judice. See, Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. den., 113 S.Ct. 2416 (1993).

First, petitioners' protestations that the Third Circuit's decisions impermissibly expands the fiduciary and disclosure requirements as codified in ERISA ignores the Supreme Court's

determination that "rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility" in passing ERISA. Central States v. Central Transport, Inc., 472 U.S. 559, 570, 105 S.Ct. 2833, 2840, 86 L. Ed.2d 447 (1985). Significantly, the concept that a fiduciary duty includes the obligation to refrain from making material misrepresentations is deeply rooted in the common law of trusts. Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990) ["the duty to disclose material information is the core of a fiduciary's responsibility, emanating from the common law of the trust long before the enactment of ERISA."] The Restatement of Trusts (Second) specifically admonishes:

> "[The Trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person... Restatement (Second) of Trusts, §173, comment d (1959).

Simply stated, the obligation of a fiduciary to communicate honestly and refrain from making affirmative misrepresentations to those with whom he is in a trust relationship is the foundation of trust law; the imposition of this fiduciary duty upon plan administrators under ERISA is entirely consistent with Congress' expressed intent to invoke the common law of trusts to define the general scope of their authority and responsibility.

Secondly, the fact that this obligation to speak truthfully is imposed upon a plan administrator who is also the employer of the plan participants is not inconsistent with the statutory authority for an employer to act simultaneously as a plan sponsor and plan administrator. Indeed, the Third Circuit expressly acknowledged that under ERISA, an employer is allowed to wear "two hats" as both employer and plan administrator. The Court also reaffirmed

that as an employer, neither PECo nor its business decisions were subject to ERISA's fiduciary duties. PECo seized upon this distinction and argued that since PECo the employer never told PECo the plan administrator (the benefits counselors) that it was considering a change to the pension plan, the counselors were telling the truth when they informed the respondents that they knew of no such plans and, therefore, there were no affirmative misrepresentations. The Court found this argument unpersuasive specifically holding:

> "This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a chinese wall around those employees on whom plan participants reasonably rely for important information and guidance about retirement." Fischer v. Philadelphia Electric Co., supra., 944 F.2d at 135; see also, Kurz v. Philadelphia Electric Co., 944 F.2d 136, 139 (3d Cir. 1993).

Now, before this Court, PECo takes a slightly different tact, arguing that the communication or lack thereof to employees about decisions to amend the pension plans were part of PECo's business activities to which fiduciary duties do not apply. Such a strained interpretation of the two-hat rule is inconsistent with ERISA when viewed from the perspective of the plan participant whose interests ERISA was designed to protect. That is, when the respondents went to their retirement interviews and asked questions regarding potential changes to the pension plan, they understandably expected the benefits counselor to provide complete, accurate and truthful information. These loyal employees had no reason to suspect that PECo the employer would withhold from the benefit counselors information which these potential retirees considered vital to their retirement decision. After all, the benefit counselors were specifically charged with the responsibility of providing information

regarding pension benefits. Both PECo the employer and plan administrator knew full well that these potential retirees were asking questions about possible changes to the plan. PECo the employer also knew full well that the answers disseminated by the benefits counselors -- that no such plans were being contemplated -- were inaccurate. To accept petitioners' argument that as an employer, PECo had no fiduciary responsibilities to correct the misinformation it knew was being disseminated would effectively abolish the fiduciary protection from misrepresentations afforded to plan participants under ERISA. In short, to allow PECo to unilaterally choose to wear only the employer hat when communicating with plan participants would undercut the purpose of ERISA to enforce strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 158, 105 S.Ct. 3085, 3098, 87 L. Ed.2d 96 (1985).

Third, all of PECo's arguments as to the calamitous consequences that will ensue if the Court of Appeals' decisions are upheld are based upon the assumption that the Third Circuit has imposed a duty upon PECo to disclose its internal business deliberations, negotiations, and activities to the employee population. Neither the Third Circuit nor respondents are suggesting that the employer has an affirmative duty to disclose all of its business negotiations and dealings; nor is the employer faced with the obligation to predict with precision future amendments to the plan. The Third Circuit specifically held:

> "An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, 'a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process.'" Fischer, supra., 994 F.2d at 135 quoting, Drennan v. General

Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992), cert. den., 113 S.Ct. 2416 (1993).

As a practical matter, the Third Circuit's decisions give rise to one simple rule as articulated by Judge Feinberg in the Fischer case: "When a plan administrator speaks, it must speak truthfully." Fischer v. Philadelphia Electric Co., supra., 994 F.2d at 135. Under the precise factual scenarios presented to this Court, this rule only required PECo to truthfully answer the respondents' questions by acknowledging that plans to enhance pension benefits were being considered. The Third Circuit's opinion requires no predictions as to the eventual adoption of such plans nor does it compel PECo to disclose all of the business dealings and negotiations involved in developing the amendment to the pension plan.

In an effort to manufacture special and important reasons for granting certiorari, PECo invites the Court to review various speculative factual scenarios which far exceed the circumstances of the present cases. Both the Fischer and Kurz cases involved a narrowly-tailored, specific factual setting where the plan administrator was fully cognizant that the subordinates it appointed to answer important pension benefit questions was unwittingly providing inaccurate information in response to the plan participants' specific questions regarding changes to the pension plan. There is nothing extraordinary or novel about holding the plan administrator accountable for the misrepresentations under this factual scenario. As articulated by the Third Circuit, "this duty to communicate complete and correct material information about a beneficiary's status and options is not a novel idea." Fischer v. Philadelphia Electric Co., supra., 994 F.2d at 135, quoting, Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 751 (D. Ct. Cir. 1990). Accordingly, it is submitted that the Court should not give deference to the far-fetched examples of the dire consequences PECo conjures up to persuade the Court to grant certiorari.[2]

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[2] Parenthetically, petitioners cite the case of Zschunke v. Bell Atlantic Corporation, C.A. No. 93-CV-3326 as an example of a case which expands the PECo cases since the personnel conveying the

B. The Decisions of the Third Circuit Effectuate the Policies under ERISA as Defined by the Decisions of this Court.

The petitioners on the one hand vigorously argue that the Third Circuit's decisions are in conflict with decisions of the United States Supreme Court while on the other hand they concede that this Court has never addressed the issues concerning the fiduciary responsibilities under the factual setting of the Fischer and Kurz cases. In reliance upon this Court's recent decision in Mertens v. Huyett Associates, 113 S.Ct. 2063, 124 L. Ed.2d 161 (1993), PECo argues that the Third Circuit decisions are in conflict with this Court's expressed reluctance to expand ERISA beyond the language of the statute adopted by Congress. This argument, however, is based upon the erroneous factual predicate that the Third Circuit expanded the obligations of a fiduciary under ERISA. To the contrary, the impact of the Third Circuit's decision -- to assure that plan administrators comply with their fiduciary obligations to speak truthfully to plan participants -- effectuates the underlying purpose of ERISA to enforce strict fiduciary standards of care in the administration of all aspects of pension plans and the promotion of the best interests of participants and beneficiaries. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 158, 105 S.Ct. 3085, 3098 (1985). Far from expanding the scope of ERISA, it is evident that in ruling that PECo, as the plan administrator had a fiduciary obligation to answer participants' questions forthrightly, the Court adhered to well-established principles of trust law.

Significantly, this Court has consistently held that ERISA was grounded in the common law of trusts and, more importantly, that the Court was to be guided by principles of trust law in construing the terms of the statute. Firestone Tire & Rubber Co.

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misinformation were supervisors, not benefit counselors. What the petitioners failed to apprise the Court, however, is that these supervisors were given an express directive from the Human Resources Department to answer the questions of potential retirees regarding possible changes to the pension plan by stating that no such plans were being considered for the near future. This factual setting is virtually indistinguishable from the PECo cases.

v. Bruch, 489 U.S. 101, 111, 109 S.Ct. 948, 103 L. Ed.2d 80 (1989). Indeed, in the Firestone case, supra, this Court has made the following pertinent observations:

1. ERISA "abounds with the language and terminology of trust law" and must be construed against the background of the common law of trusts. Id. at 110-111, 109 S. Ct. at 954-955;

2. Absent some express statutory departure, Congress intended that the courts would look to the settled experience of the common law in giving shape to a "federal common law of rights and obligations under ERISA-regulated plans." Id., 489 U.S. at 110, 109 S.Ct. at 954; see also, Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., supra.;

Succinctly, the Third Circuit decisions are unequivocally premised upon traditional concepts of trust law and, as such, are entirely consistent with this Court's instructions to construe ERISA against the background of the common law of trusts.

C. The Decisions of the Third Circuit are Not in Conflict with the Decisions of Other Courts of Appeals.

The petitioners have correctly advised the Court that the decisions of the Third Circuit are entirely consistent with the decisions of the Sixth Circuit in the cases of Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. den., 113 S.Ct. 2416 (1993) and Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988). In each case, the Sixth Circuit specifically held that a plan administrator had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the offering of enhanced benefits when such plans were under serious consideration. Contrary to PECo's representations, neither the Sixth Circuit nor the Third Circuit has compelled an employer to disclose its business deliberations to plan participants. As confirmed by the Sixth Circuit in Drennan and

repeated by the Third Circuit in Fischer, the obligation of an ERISA fiduciary is to answer participants' questions forthrightly, "a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process." Drennan v. General Motors, supra, 977 F.2d at 251 quoted in Fischer v. Philadelphia Electric Co., supra, 994 F.2d at 135.

It is significant that, in contrast to the Fourth and Seventh Circuit Court of Appeals cases cited by petitioners as examples of decisions in conflict with the Third Circuit decisions, the Sixth Circuit opinions in Drennan, supra, and Berlin, supra, are virtually identical to the factual circumstances presented in the Fischer and Kurz cases. Because of this factual disparity, it is erroneous for the petitioners to argue that the decisions of the Fourth and Seventh Circuits are in conflict with the decisions of the Third and Sixth Circuits, thereby warranting review by the United States Supreme Court. For example, in Elmore v. Cone Mills Corp., Nos. 92-1362, 92-1363, 92-1404, 92-1482, 1993 WL 368872 (4th Cir. September 22, 1993), the employer had sent letters to employees in connection with a leveraged buy-out stating its proposed intention to contribute certain surplus assets in the employee retirement plan to an employee stock ownership plan. The employer specifically qualified this proposal, advising that "we are, however, giving you information now based on our present plans which are subject to revision to meet changing situations." Upon completion of the buy-out, the employer failed to make the surplus contribution in full. It is significant that in denying the plaintiffs' claim to the additional surplus assets, the Court concluded that "there is no evidence that Cone Mills was untruthful regarding its intentions when the communications at issue were made. In addition, the record reflects that Cone Mills was careful in drafting the December letters to alert its employees that all plans were tentative and subject to change." Elmore, supra., 1993 WL 368872 at *26. The factual distinction between Elmore and the Fischer and Kurz cases is obvious and compels the conclusion that these cases do not represent a conflict among the circuits concerning fiduciary obligations owed under ERISA.

The case of Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986) is subject to the same factual discrepancies as the Elmore case. In Stanton, the Court held in dicta that it is not a violation of ERISA to fail to furnish information regarding potential amendments before they are put into effect. The Stanton court, however, recognized that the plaintiffs' claims of misrepresentation were not supported by the evidence, implying that such misrepresentations, if proven, would violate ERISA. Id. at 435.

The decisions of the Seventh Circuit are equally unavailing to the petitioners' argument that a conflict exists among the Courts of Appeals. Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th Cir. 1988), cert. den., 488 U.S. 481, 109 S.Ct. 529 (1988) dealt only with a failure to disclose information about a severance pay plan (which in and of itself is distinct and different from a pension benefit plan which is subject to more scrutiny under ERISA); there were no allegations of misrepresentation, thereby rendering the Young decision irrelevant to the Third Circuit opinions regarding the fiduciary obligations to refrain from making affirmative material misrepresentations concerning changes to a pension plan.

United Independent Flight Officers v. United Airlines, 756 F.2d 1274 (7th Cir. 1985) merely held that an employer did not act as the fiduciary while negotiating a collective bargaining agreement, because of the obviously conflicting roles of fiduciary and negotiator. Where, as here, however, misrepresentations are made about the potential changes to an ERISA pension plan, clearly ERISA's fiduciary duties to speak truthfully apply.[3]

Succinctly, the artificial conflict which the petitioners zealously attempt to define among the Circuit Courts of Appeals, is

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[3] The remaining cases cited by the Petitioners, Belade v. ITT Corp., 909 F.2d 736 (2nd Cir. 1990); Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir. 1989) cert. den., 493 U.S. 919 (1989); and Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991) are so factually irrelevant to the issues decided by the Third Circuit Court of Appeals as to render further comment unnecessary.

illusory and, therefore, does not provide a legitimate basis for review by the Supreme Court.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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MOTION FILED
NOV 19 1993

No. 93-631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE PHILADELPHIA ELECTRIC COMPANY, *et al.*,
Petitioners,
v.
HERBERT L. FISCHER, *et al.*,
Respondents.

THE PHILADELPHIA ELECTRIC COMPANY, *et al.*,
Petitioners,
v.
DONALD R. KURZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Philadelphia Electric Company, *et al.*, Petitioners, whose written consent has been provided to the Clerk of the Court.

Counsel for Respondents Herbert L. Fischer, *et al.* and Donald R. Kurz, *et al.*, after being asked, indicated in writing that they "neither refuse nor consent to the filing of an *amicus curiae* brief but instead take no position on this issue." Because all parties have not consented, a motion to file this brief is required.

In support of this motion, EEAC, by the following, shows that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 280 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* As employers, virtually all of EEAC's members and member constituencies maintain employee benefits plans, including early retirement incentive programs, over and above normal wages and salaries. These plans either are adopted at the employer's option or are products of collective bargaining with employee representatives.

3. Because of such involvement in ERISA and the ADEA, EEAC members have a substantial interest in the outcome of this case, which addresses the issue of whether an employer must inform its employees of possible new early retirement plans, or of potential changes to existing pension benefit levels, before those plans or changes have been put into effect.

4. Accordingly, the issue presented in the petition is extremely important to EEAC's nationwide constituency. The Third Circuit below held that ERISA requires an employer to inform employees when a new early retirement plan is under "serious consideration." This undefined standard is causing considerable economic and practical problems for EEAC members attempting to implement early retirement incentive programs.

Under this amorphous standard, employers are faced with the possibility of litigating what is and is not "serious consideration." Aware of potential lawsuits, employers will be forced to provide employees with constant updates on the status of highly sensitive, executive-level deliberations and variations on potential early-retirement incentives and pension plan changes that may or may not ever materialize.

In either case, employers face the potential for increased litigation from employees who claim to have relied to their detriment upon the presence or absence of information about possible future plan changes that have not yet been adopted. EEAC's brief explains to the Court that the decision below adopts an unworkable standard that should be rejected by this Court.

5. The Third Circuit's rule is contrary to decisions in several other courts that have held that employers do not have a fiduciary obligation under ERISA to inform employees about changes in non-vested benefit plans until such changes have been adopted. *See e.g., Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.),

cert. denied, 488 U.S. 981 (1988); and *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274 (7th Cir. 1985). Because EEAC's members are large, national employers with operations in many federal judicial circuits, this split of authority is extremely problematic. Employers operating under varying disclosure rules face significant legal risks depending upon where employees are located.

6. Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 330 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated as *amicus curiae* in cases involving ERISA preemption of state law.[1] Furthermore, a number of other cases in which EEAC has participated have involved the proper interpretation of ERISA provisions in relation to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*[2] In addition, EEAC has briefed a number of other employment issues in this Court.[3]

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[1] *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *General Motors Corp. v. Wells*, 881 F.2d 166 (5th Cir. 1989) *cert. denied*, 110 S.Ct. 1959 (1990); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983); *Nolan v. Otis Elevator Co.*, 505 A.2d 580 (N.J. 1986); *Brooklyn Union Gas Co. and American Airlines v. N.Y. Human Rights Appeal Board*, 359 N.E.2d 393 (N.Y. 1976).

[2] *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989); *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir.), *vacated and remanded*, 110 S. Ct. 37 (1989), *on remand* 907 F.2d 1354 (3d Cir. 1990); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied* 112 S. Ct. 177 (1991); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036, *cert. denied* 113 S. Ct. 412 (1992).

[3] *Int'l Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); and *Harris v. Forklift Systems, Inc.*, No. 91-1168, decided November 9, 1993.

7. EEAC also participated as *amicus curiae* in *Arthur v. Bell Atlantic Corp.*, No. 93-1483 (4th Cir.), argued October 27, 1993. That case raises the same issue as in this case. There, however, the district court applied the Fourth Circuit's *Stanton* decision, cited above, and ruled that there is no fiduciary obligation under ERISA to provide information regarding changes in employee benefit plans until those changes are put into effect.

8. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical effect that the decision will have on employers and potential beneficiaries of early retirement benefit plans.

9. EEAC's brief is timely as it is being filed within the time allowed for filing a brief in opposition to the petition. *See* Supreme Court Rule 37.2.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council, respectfully requests that the Court grant it leave to file a brief as *amicus curiae* in this case in support of Petitioners.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 93-631

THE PHILADELPHIA ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

HERBERT L. FISCHER, *et al.*,
Respondents.

THE PHILADELPHIA ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

DONALD R. KURZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQAUL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

1. *The Underlying Facts.* The respondents are former employees of the Philadelphia Electric Company (PECo). Pet. App. A-22 and A-36.[1] In *Fischer*, PECo was considering the possibility of a costcutting plan that would involve a reduction in the number of employees. Pet. App. A-25. It had hired an outside consultant to develop a long-range strategic plan for cost-reduction. PECo's decision on early retirement modifications would depend, in part, on whether it received an electric utility rate increase from the Public Utility Commission. *Id.*

In *Kurz*, PECo was looking into possible amendments to its pension benefits formula for an existing plan. The employer considered alternative benefit formulas, including surveys comparing PECo's benefits to those of other utility companies. Pet. App. A-37 to A-39.

During this period of uncertainty, respondents made inquiries about whether PECo had any plans to adopt an early retirement incentive program (*Fischer*) or might be planning to increase the level of its early retirement benefits (*Kurz*). PECo's employee benefits counselors responded that they were unaware of any changes being considered and had no knowledge of any new plan. Pet. App. A-34 to A-35 and A-46 to A-47.

Respondents allege that PECo in fact was considering making such changes and that they were not so informed.

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[1] Citations to the Appendix to the Petition for a Writ of Certiorari are noted as Pet. App. ——. The opinions of the Court of Appeals for the Third Circuit below, reported at 994 F.2d 130 and 994 F.2d 136 are reproduced as Pet. App. A-1 to A-20. The unreported opinion of the district court is reproduced as Pet. App. A-21 to A-61.

As a result of the employer's statements, they allege, they accepted benefits that were less than they would have received had they continued working until the new programs were put into effect. Thus, respondents allege that PECo violated its obligations under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* by not informing employees of possible early retirement plans or of possible changes to an existing pension benefits plan. Pet. App. A-48.

2. *The District Court's Decision.* The district court held that ERISA does not require an employer to disclose information on benefit plan changes before the plan or change is put into effect. Pet. App. A-49 to A-50. Specifically, the district court stated:

> It has been held that when an employer acts in the capacity of a corporate decision maker, no fiduciary duties attach. *See Trenton v. Scott Paper Co.*, 832 F.2d 806 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). Where employers wear two hats, as employers and plan administrators, fiduciary status is only assumed when and to the extent that they function in their capacity as plan administrators. *Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 225 (3d Cir. 1989), *quoting, Amato v. Western Union Intern. Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985).
>
> Nothing in the statutory language of ERISA indicates there is a duty to disclose information on benefits plans before they take effect. *See Payonk*, 883 F.2d at 221; *Trexel v. E.I. DuPont De Nemours & Co.*, No. 85-759 (D. Del. Sept. 9, 1987), aff'd mem. 845 F.2d 1016 (3d Cir. 1988). Courts in other circuits have also held that a duty to disclose information on benefits before they take effect does not exist. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Fine v. Steele*, 699 F.2d 1091, 1094 (11th Cir. 1983); *Fenton Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (19th Cir. 1982).

Pet. App. A-49 to A-50. The district court also found that, on the record, there was "no evidence of affirmative material misrepresentations made by any fiduciary or non-fiduciary employee of PECo." Pet. App. A-52. Further, the district court held that the potential changes were not under "serious consideration" until they were presented to the corporation's Board, which had the final authority to implement the changes. Pet. App. A-51.

3. *The Third Circuit's Decision.* The court of appeals below, however, reversed the district court. The Third Circuit adopted the view of the Sixth Circuit that ERISA requires an employer to inform employees when a new early retirement plan is under "serious consideration." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); and *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993).

The court thus held that a plan administrator may not make affirmative material misrepresentations about possible plan changes. It also stated that a misrepresentation is "material" if there is a "substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire." Pet. App. A-11 and A-19.

The issue before the Court is whether an employer has a fiduciary responsibility under ERISA to communicate with its employees regarding a possible business decision to change a benefit plan either before that plan is put into effect, or at least before the change has been presented to the employer's Board of Directors or other entity with final authority to implement the changes.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The court below adopted the improper view of the Sixth Circuit that ERISA requires an employer to inform employees when a new early retirement plan is under "serious consideration." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); and *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993). These cases hold that when an employer "seriously considers" a possible future benefits plan, that employer has a fiduciary duty to disclose "the progress of its serious deliberations to make the plan available." The decisions of the Sixth Circuit are contrary to decisions in several other courts, which hold for example, that "it is not a violation of ERISA to fail to furnish information regarding amendments before those amendments are put into effect." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). The decision below is causing extreme confusion for employers' benefits' counsel and officers responsible for employee benefit plans.

Additionally, the "serious consideration" rule is impractical and impossible to apply. It places employers in the dilemma of being sued if they do not adopt preliminary plans they were considering, and also of being sued if they withhold information from employees who may retire while final decisions are being made. Indeed, the typical plan goes through many drafts before final adoption or rejection. Premature disclosure could lock employers into ill-conceived plans or gull employees into accepting early retirement based on possible benefits that are not forthcoming.

REASONS FOR GRANTING THE WRIT

BY REQUIRING EMPLOYERS TO DISCLOSE WHENEVER CHANGES IN BENEFIT PLANS ARE UNDER "SERIOUS CONSIDERATION," THE COURT OF APPEALS ADOPTED AN UNWORKABLE STANDARD THAT IS CAUSING EGREGIOUS ECONOMIC AND PRACTICAL PROBLEMS FOR EMPLOYERS, PARTICULARLY THOSE WHO ALSO OPERATE IN CIRCUITS WHOSE DECISIONS HAVE REJECTED THE "SERIOUS CONSIDERATION" STANDARD.

The Third Circuit's decision requires employers to disclose changes in benefit plans before those changes have been adopted, when they are only under "serious consideration." The Third Circuit began its analysis by stating correctly, that "[a]s an employer, neither PECo nor its business decision to offer an early retirement program were subject to ERISA's fiduciary duties. *See e.g., Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989)." Pet. App. A-6. Relying on this principle, the district court below dismissed the suit because the benefits decisions involved in this case were business decisions that did not implicate ERISA' fiduciary obligations.

The Third Circuit, however, then went astray by embracing the approach of the Sixth Circuit that confuses the employer's business decisions with its fiduciary obligations. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988); and *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993). Those decisions state that if an employee asks about possible changes in early retirement plans, the employer must "disclose[] the progress of its serious considerations to make a plan available to affected employees. *Berlin*, 858 F.2d at 1164." *Drennan*, 977 F.2d at 251.

As now shown, the decision below conflicts with other court holdings and misinterprets ERISA. Further, the "serious consideration" approach is causing practical problems for employers attempting to balance the need to

consider various benefit options with the strong likelihood of being sued by employees who make decisions based upon information whose status is very likely to change before a final corporate decision is made.

A. Requiring Employers to Disclose the Possible Creation of a Proposed Benefit Plan Before that Plan is Implemented Imposes Egregious Economic and Practical Problems on Employers.

As noted, the decision below imposes on employers a fiduciary duty to disclose the possible creation of a proposed benefit plan before that plan is implemented and before there is any certainty that it ever will be adopted. This decision is creating egregious economic and practical problems on employers. Indeed, the Third and Sixth Circuit decisions have been subjected to unremitting criticism from benefits counsel and officers because of the practical and legal problems they have created.

1. *The "Serious Consideration" Test is Not Susceptible to a Workable Definition. Moreover, Employers Who Follow the Decision Below Face The Likelihood Of Being Sued Based Upon Information Disclosed Prior To The Plan's Final Adoption.*

The decision below purportedly would require disclosure only when the decision whether to adopt a new plan or modify an existing one is under "serious consideration." This formulation, however, is extremely broad and could encompass any internal discussion that could lead to a change in benefit plans. In reality, the rule will require employers to disclose the mere possibility of a new plan or a changed plan.

"Serious consideration" is not susceptible to a fixed definition, and there is not a standard under which an employer could determine when the requirement would mandate disclosure. Thus, because significant liability

may attach, cautious employers might feel compelled to disclose any suggestion that an employee benefit plan be modified.

However, as we show below, premature disclosure before a plan is finally adopted may not resolve the problems facing employers and employees, but rather increase them. Employers who consider proposals to create new benefit plans will be faced with an impossible choice: they can disclose their internal deliberations and risk liability if the plan is not adopted, or they can delay announcement of the plan until the formal plan is adopted and face liability, as in this case.

This impossible burden can be resolved by reversing the decision below and holding that an employer who is considering the business decision of whether to change a benefit plan does not have a fiduciary obligation to disclose the change until it is adopted.

2. *The Third Circuit's Decision is Out of Touch with How Plans Actually Are Adopted by Major Employers. Typically, There Is No "Plan" Until The End of a Complicated Decision Making Process With Many Entities Having Input Into the Discussions.*

It would be naive, at best, to think that when employers are considering early retirement incentive plans, there usually is some "plan" that is sitting on the shelf waiting to be announced. In the typical situation, many different decision makers will be involved in a complicated "process" in which many alternatives and options will be discussed, modified, rejected, or adopted.

Many companies establish their post-employment retirement and severance policies in response to unforeseen but ongoing economic exigencies. Indeed, early retirement plans often are offered in the face of business difficulties and economic uncertainty. Economic circumstances and employees' reactions to employer policies, often make it

difficult to predict, much less guarantee, what these extra benefit packages will look like. Economic decisions may be made in series over time, and often it is impossible for employers to predict economic conditions over several months, much less over several years.

When an employer decides to downsize, it has to predict how many employees it ultimately will need, as well as how many eligible employees or retirees will opt to take an early retirement offering. If the plan is too generous, it may be oversubscribed and the employer may have to hire new employees or rehire those who chose to retire under the plan. On the other hand, it is possible that not enough employees will subscribe to the plan, and a subsequent early retirement offering may be required.

In this time period, economic conditions may change and previous assumptions about work force needs and the amount of funds available for retirement incentives may need to be modified, particularly when the employer begins to learn how many and which employees have opted into the first early retirement offering. Thus, employers have to balance these realities and often are unable to settle on the terms of a second offering until the first has run its course.

In addition to economic uncertainties, it would be extremely difficult to pinpoint any particular decision maker who could speak authoritatively on whether a plan will be offered, or what it would contain. For example, participants in these discussions typically include benefits experts, labor and benefits counsel, human relations specialists, plant managers, line managers, actuaries, outside consultants and ultimately, the company's management committee and Board of Directors.

These entities will have to balance and consider multiple changing factors such as predicted headcount, benefit costs, and the availability of present assets for lump sum payments versus payments over time. Along the way,

various options will be proposed, examined, revised, rejected, or possibly reinstated or accepted with modifications.

During this period, the available information will be spread out among several individuals and departments and often it would be extremely difficult to give complete, accurate information on the status of the plan being considered. Indeed, during this period there may be substantial internal negotiations regarding the terms of any potential offering.

Coupled with these internal practical and economic problems, unionized employers, such as in *Drennan*, will have to negotiate with the union before announcing any new benefits. The union, of course, serves many constituencies and will have its own members' interests to balance, particularly those of its remaining incumbent members and the benefits to be received by potential retirees. Indeed, some employers have had to face lawsuits from unions and cities challenging the employer's decision to close or downsize a plant. As a result, the size and shape of an early retirement package can be changing constantly.

In addition, recent amendments to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* have raised potential new legal liabilities regarding early retirement enhancements, severance pay offsets for retirement eligible individuals and information disclosure regarding eligible employees. See Titles I and II of the Older Workers Benefit Protection Act, Public Law 101-433, 101st Congress, October 16, 1990, 104 Stat. 978, 29 U.S.C. § 624(f) and (l).

Particular ADEA concern must be given to the retiree health benefit and the early retirement incentive offsets to severance pay. The 1990 amendments require careful actuarial calculations so that retirees receive the full amount due them in severance pay *plus* existing retire-

ment benefits under the ADEA's requirements. Typically, the employers' labor counsel spend extensive time with the employers' benefits experts analyzing the costs of proposed benefits alternatives when considered in light of the requirements of the ADEA and ERISA.

In all of these examples, an early retirement offering may be under "serious consideration." But in most of these examples it would be an extreme hardship to require an employer to disclose the possibility in terms of the potential plan until it is finally adopted. For these reasons, the "serious consideration" rule is completely impractical.

3. *The Policy Underlying the Fiduciary Duty of Disclosure Would be Retarded, Not Advanced, by Requiring Premature Disclosure Before a Plan is Put Into Effect.*

The policy underlying the fiduciary duty of disclosure—to ensure that beneficiaries make informed and rational decisions—would be retarded, not advanced, by requiring premature disclosure before a plan is put into effect. Many, indeed most, proposals that are eventually adopted evolve as they are developed so that their ultimate form is likely to be substantially different from the one that is "seriously considered" in a preliminary version.

Under the "serious consideration" approach, therefore, employees who act upon a preliminary version of a plan may find that its terms have changed and their expectations have been thwarted. Indeed, requiring disclosure of plans that are under "serious consideration" would be an impossible burden on employers and a disservice for potential beneficiaries.

The Third Circuit's approach shows a lack of understanding of employee benefits practices and many factors that come into play in adopting an early retirement plan. First, it should be noted that early retirement incentive plans are not vested, and thus the employer has broad dis-

cretion in the benefits it offers. Such plans go beyond any legally-required benefit and provide an extra post-retirement flow of income to eligible employees. Indeed, even with existing plans, an employer may change, restrict or withdraw entirely an existing plan, subject only to guarantees in the plan. *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988).

It is evident that the courts adopting the "serious consideration" test have not considered the harm that this amorphous standard could cause to potential beneficiaries. In almost all instances when an early retirement plan is offered, it is a nonmandatory plan intended to assist departing workers after they leave the company. Under the Third Circuit's rule, however, many of these systems could be jeopardized.

Employers would be encouraged either to eliminate early retirement plans altogether, or to cut their liability by reducing the benefit levels in plans offered at a later time. Indeed, several EEAC members have informed us that the decisions below have had precisely this effect.

The problems created by the approach of the Third and Sixth Circuits were summarized succinctly by the district court in *Arthur v. Bell Atlantic*, No. 3-93-CV-854 (E.D. Va. filed Mar. 18, 1993) at 5:

> Employees undoubtedly benefit when their employers upgrade severance packages and implement more generous pension benefit plans for their workers. Recognition of plaintiffs' cause of action would have a chilling effect on such activities, as employers would be frightened even to put proposed new packages on the drawing board for fear that they might get sued for failing to disclose plans that are not yet, and may never be, formally adopted.

Thus, the decision below could well have the effect of depressing the overall availability of retirement benefits and discouraging employers from even considering a benefit plan that is more generous than an earlier plan.

B. The Decision Below Directly Contradicts Decisions by Other Circuits, Causing Great Confusion, Particularly for Employers With Operations In More Than One Circuit.

The decision below cannot be reconciled with the decisions of other courts that have rejected similar claims under ERISA. Numerous other courts have held that changes in plans need not be disclosed until they become effective. The Fourth and Seventh Circuits, for example, have held that employers have no fiduciary duty under ERISA to disclose their intentions until the terms of the plan are put into effect. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986); and *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 448 U.S. 981 (1988).

In *Stanton*, the plaintiff chose to retire early and receive benefits under an existing severance plan. Shortly before the plaintiff retired, Gulf considered and approved a new employee welfare plan providing for enhanced severance benefits. The new plan was instituted on the same day that the plaintiff retired.

Before accepting his plan, Stanton specifically asked Gulf representatives whether a more attractive plan was in the works. Gulf representatives did not inform him that the new (and more attractive) plan had been approved. The plaintiff sued, claiming that he was entitled to the benefits of the new plan because Gulf had violated its fiduciary duty under ERISA by not disclosing its consideration of that plan. 792 F.2d at 433.

The court rejected the plaintiff's claim and held that the fiduciary duties that arise under ERISA are owed only to "participants" in an ERISA plan, and that an employee is not a "participant" in an ERISA plan until the terms actually are adopted in the plan.

> Although ERISA does mandate fiduciary duties with respect to employee benefits plans, such duties are solely with respect to participants. The duties do

> not begin until the terms at issue are incorporated into a plan.

Id. at 435.

Additionally, the court noted that the statements made to Stanton by Gulf representatives did not constitute "misrepresentations," because all that Stanton had asked for was information "about the possibility of changes which could be made" at some future point. *Id.* The court held that Gulf was under no duty to disclose such a possibility, stating that:

> It is not a violation of ERISA to fail to furnish information regarding amendments before those amendments are put into effect . . . . This is so because the legislative intent of ERISA was not to assure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits.

Id.

In *Young v. Standard Oil*, the Seventh Circuit drew the proper distinction between a business decision and "*administering* a benefit plan . . . ." 849 F.2d at 1044 (emphasis in the original). The court agreed with the employer's arguments that "there is no fiduciary duty in implementing, altering or abolishing a benefit plan involving nonvested benefits;" and that "defendants were free to create the special F&P severance plan *without notice* to the plaintiffs." *Id.* (emphasis added).

The Seventh Circuit held that an employer may amend a nonvested severance plan "without violating ERISA." 849 F.2d at 1045. The Seventh Circuit recognized that a duty to disclose deliberations about plan changes did not arise "just because Amoco administered its employees' severance plan." *Id.* Indeed, the court stated unequivocally that "Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of the F&P Division." *Id.*

The Seventh Circuit came out the same way in a unionized setting, thus taking a position directly at odds

with the Sixth Circuit's *Drennan* decision. In *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1280 (7th Cir. 1985), the court rejected the plaintiffs' ERISA claims that the employer and union were fiduciaries with respect to negotiated changes in the airline pilots' benefit plans. The Court stated:

> neither a union nor an employer is an ERISA "fiduciary while, or merely because, it is negotiating the terms and conditions of future pension benefits, at least where these benefits are not protected under ERISA's vesting and nonforfeitability provisions." Citing *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985).

The court, therefore, concluded that United was not a fiduciary because of its status as a negotiator over the terms of the plan and "could not have breached any fiduciary duties with respect to the terms of the plan *until those terms were incorporated into the plan at the conclusion of negotiations.*" 756 F.2d at 1280 (emphasis added).

Other decisions also conflict with the decision below. *See Barnes v. Lacy*, 927 F.2d 539, 543-44 (11th Cir. 1991) (court refused to adopt the position that an employer had "a duty to announce its intention to reserve the right" to make changes to existing plans or to offer new ones), *cert. denied*, 112 S. Ct. 372 (1991); *Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 224-6 (3d Cir. 1989) (there is no duty to disclose preliminary termination discussions until a final decision is made); cf. *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (per curiam) (rejects the argument that fiduciary has the duty to disclose plan changes prior to the notification mandated by ERISA's disclosure provisions), *cert. denied*, 485 U.S. 937 (1988); *Trexel v. E.I. du Pont de Nemours & Co.*, No. 85-759 (D. Del. Sept. 9, 1987), aff'd mem. 845 F.2d 1016 (3d Cir. 1988) (court held employer had no obligation under ERISA to provide the plaintiff with information on an upcoming benefit plan

before the plan was put into effect); and *Sleichter v. Monsanto Co.*, 612 F. Supp. 856 (E.D. Mo. 1985) (holding that ERISA did not require disclosure of an early retirement program in its formative stages even though plaintiff inquired).

These decisions are in direct conflict with the position of the Third and Sixth Circuits, which require an employer to "fairly disclose[] the progress of its serious considerations to make a plan available to affected employees." *Drennan*, 977 F.2d at 251.

To make matters worse, the Third and Sixth Circuit decisions are so disingenuous that they are internally inconsistent. On one hand, for example, the decision below cites *Drennan* for the proposition that its holding "'does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining processes.'" Pet. App. A-10. On the other hand, *Drennan* states that an employer must "fairly disclose[] the progress of its serious considerations." 977 F.2d at 251. There is no way, however, that an employer can "disclose the progress of its serious considerations" (*Drennan*) without "disclosing its internal deliberations" (*Fischer*). This sleight of hand may be necessary so that these courts can mask the confusion they have generated, but such inconsistency creates unworkable and oppressive public policy.

Because of these conflicting approaches, employers in different circuits find themselves under different obligations with respect to disclosing information about potential benefit plans. EEAC's members thus urge the Court to grant the petition, reverse the decision below, and hold that an employer's fiduciary obligation to disclose information about benefit plans does not commence until a plan is adopted.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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